87-2018

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONALD F. REINISCH and SHELLEY G. REINISCH,

Petitioners,

v.

UNITED STATES, et al.

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Ronald F. Reinisch, Pro Se
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QUESTIONS PRESENTED FOR REVIEW

Whether the condition of home property as collateral for a small business energy loan is violative of the Due Process Clause and Equal Protection Doctrine of the Fifth Amendment.

Whether SBA determination to require Guaranty secured by Deed of Trust to private residence is a conclusive presumption that individual is personally capable of assuming the commercial debt in violation of the Due Process Clause and equal protection of the Fifth Amendment.

Whether SBA requirement of Guaranty secured by Deed of Trust to a home for commercial energy loan is an unconstitutional impairment of the exercise of a constellation of fundamental liberty interests central to which is the preservation of an established home in violation of the Due Process Clause of the Fifth Amendment.

Whether SBA determination that Solarado, Inc. was approved for a loan which combined "greater risk" of energy loan with absolute and unconditional personal guaranty of payment of a non-energy loan, without prior public notice and opportunity for public debate or without individualized notice and opportunity for objection, is in violation of Fifth Amendment due process and equal protection.

Whether requirements that petitioners produce Personal Financial History and Warranty Deed to home for SBA inspection is a search; and that petitioners execute Deed of Trust to secure Guaranty for governmental use in payment of small business energy loan is a seizure; and that the use of the documentary evidence as the basis for a judicial foreclosure of petitioners' home in a penalty forfeiture proceeding is

repugnant to the Fourth and Fifth Amend-
ments' prohibitions against unreasonable
search and seizure and self-incrimination.

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OPINIONS BELOW

The order of the Tenth Circuit Court of Appeals, whose judgment is sought to be reviewed, is reprinted in Appendix A. Prior judgment and decree of foreclosure and order of sale of the United States District Court for the District of Colorado are reprinted in Appendix B. Prior orders of District Court and collateral order and judgment of Tenth Circuit are reprinted in Appendix C.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was filed on February 25, 1988. An order granting an extension of time in which to file petition for writ of certiorari to and including June 24, 1988 was dated March 29, 1988. This Court's jurisdiction is invoked under Title 28 United States Code Sections 1254(1) and 2101(c) and Title 15 United States Code Section 636(ℓ).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

> Amendment V: ;...nor shall any person...; ...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...
>
> Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated;...

Small Business Energy Loan Act, P.L. 95-315, Sec.2.Section 7 (ℓ); Title 15 United States Code Section 636 (ℓ) provides:

> "(7) All loans made under this subsection shall be of such sound value as reasonably to assure repayment, recognizing that greater risk may be associated with loans made to business concerns in this field: Provided, That factors in determining 'sound value' shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections; and the financial status of the business concern: Provided further, That such status need not be as sound as that required for loans under subsection (a) of this section.

"(8)(A) The Administration, after consultation with the Department of Energy and other Federal departments and agencies as the Administrator deems appropriate, shall publish in the Federal Register for public comment not later than sixty days after the date of enactment of this subsection proposed regulations to carry out the provisions of this subsection. The Administration shall make all reasonable efforts to solicit comments from small businesses and shall take into consideration comments submitted regarding such proposed regulations.

"(B) The administration shall publish final regulations under this subsection not later than one hundred and eighty days after the date of enactment of this subsection.

Title 13 Code of Federal Regulations

Part 130 Section .7 provides:

Loan criteria.

The Act provides that all loans made under this authority shall be of such sound value as reasonably to assure repayment, recognizing that greater risk may be associated with loans made to business concerns in this field, provided, that factors in determining sound value shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections, and the financial status of the business concern,

and provided further, that such status need not be as sound as that required for loans under Section 7(a) of the Small Business Act.

STATEMENT OF THE CASE

SBA approval of Solarado, Inc.'s energy loan application established legitimate claim of entitlement to the substantive benefits[1] of the Small Business Energy Loan Act (July 4, 1978), P.L. 95-315, 92 Stat. 377 (hereinafter, SBELA).

SBA requirement[2] of Guaranty[3] and Deed of Trust[4] (hereinafter, "requirement" or "determination"[5]) as a condition of making a solar energy loan contradicts the enactment of SBELA.

1/ Substantive benefits are construed from the language of the "Loan Criteria" provision at subsection (ℓ), sub-subsection (7), and the rational inferences drawn therefrom. Compare with corresponding provision of Small Business Act (amended 1958), P.L. 85-536, 72 Stat. 384, 15 U.S.C. S636 (a)(7) which is as follows:

> All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment.

2/ SBA admits to petitioners' GENERAL ALLEGATION #6 of FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL, as follows:

> ... The Deed of Trust was required by the SBA as a condition of making the loan...

3/ Guaranty required Reinischs' personal signatures. Neither on the Guaranty nor in

The purpose of SBELA is to promote the commercialization of state-of-the-art solar technologies. The statutory scheme is a governmental inducement

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Loan Authorization and Loan Agreement (Direct Loans) does the word, "personal" appear. The Guaranty is "absolute and unconditional." See Words and Phrases, GUARANTY, "Absolute agreement or original promise", Vol 18A.

4/ Deed of Trust was to the Reinisch home.

5/ The Guaranty and Deed of Trust were made conditions of the Solarado, Inc. loan by SBA determination, as follows:

> ... SBA's determination [emphasis added] took into consideration the quality of Solarado's product, the technical qualifications of Mr. Reinisch, sales projections for Solarado, the Guaranty [emphasis added] of the principals, and the fact that it was a startup company, among other factors... MEMORANDUM IN SUPPORT OF DEFENDANTS' SBA AND JAMES C. SANDERS, ADMINISTRATOR, MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT, AND ON THE COUNTERCLAIM, p. 8.

SBA cited the following authority for making the "determination":

> That Act empowers SBA to make loans: '... as the administrator may determine to be necessary or appropriate...' 15 U.S. §636(ℓ)(1). Pub. L. 95-315, 92 Stat. 377, approved July 4, 1978. MEMORANDUM, supra, p. 5

Note that sub-section (1) pertains to the decision whether to approve the loan on a "direct" or government-backed "guaranteed" basis, rather than to SBA "determination" of Guaranty to be an energy loan condition.

debt financing of risky ventures that uld not be feasible for individuals, rsonally, or lenders, private or gov- nmental, to undertake without the medial legislative incentive.[6/]

SBA countermanded the incentive sis of the legislative design. The sult of SBA's misapplication of the w, specifically the imposition of rsonal loan conditions, implicated ivate property interests.

SBA shifted the full burden and ability of speculative debt financing to the individual personally. A me, personal to petitioners, is com- etely unrelated to other Reinisch tributes that were in fact relevant SBELA.[7/]

See House Report No. 95-1071, pp. 6, 10, , E-9; Senate Report No. 95-828, pp, 6, 8, 3; Report No. 96-1451, F-14 thru F-17.

Personal attributes of technical competency hed with legislative design and public

Personal requirement rendered the technical contribution moot. The legislative design explicitly calls for technical stature rather than financial status to promote the commercialization goal. The requirement and the enforcement in a foreclosure proceeding is exhorbitant payment rather than "as to reasonably assure repayment" mandated by the legislation.

"Reasonably" derives part of its meaning from post-enactment field history of the business because, after all, the legislative thrust is precisely embodiment of greater commercial risk in firms

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purpose. Ronald Reinisch's expertise derives from educational and experiential background in the advancement of materials research (i.e., PhD degree; 15 years at NASA developing novel materials for outer space environments; patented design of solar collection device utilizing advanced materials). In Solarado, Inc. the Government had what it legislated into existance: a new business fueled by individual lifetime dedication to advancing state-of-the-art material technology, redirected toward the National promotion of solar energy commercialization.

like Solarado, Inc. The two years of Solarado, Inc.'s struggle to stay alive is testimony to the meaning of "reasonably".8/

Since the direct, active promotion of solar energy commercialization had never before been undertaken on a national scale at the small business level, it was sheer economic experimentation.

A. SBELA IS GOVERNMENTAL ASSUMPTION OF "GREATER RISK".

SBELA is legislative inducement of greater commercial risk undertaking. The "greater risk" is the flip side of "reasonably" and imparts meaning "as to reasonably assure [commercial]

8/ Solarado, Inc. submitted periodic status reports to advise the SBA field office of its slow progress; and communicated by telephone at approximately four-month intervals with economic analyst in the Advocacy Office of SBA Washington, D.C. headquarters. SBA hired a business consultant to analyze, post hoc, the Solarado, Inc. predicament and impediments to its progress. See "A Report to The Small Business Administration." H-1

repayment." Solarado, Inc. was the objectification of the experimentation.[9/]

Justification for governmental acceptance of the "greater risk associated with loans made to business concerns in this field" is part of the pre-enactment and post-enactment legislative histories.[10/]

9/ Evidence of experimentation are, inter alia, the following factors: (1) Lack of track record data for these new industries precluded prediction of rate of future growth and earnings performance. Solarado, Inc. projected earnings was based on U.S. Dept. of Energy statistical data. Mr. Hime, Solarado, Inc.'s [second] loan officer, stated in deposition testimony that industry averages were not available for comparison in the standard reference directory. See Senate Report No. 95-828, p. 9. E-15. (2) The immaturity of the barely emergent markets for solar energy bred rampant consumer skepticism about purchasing unproved solar technologies. Solarado, In. was front-line offense for reversing consumer resistance. See Affidavit of Ronald F. Reinisch, #16, I-13; "A Report to the Small Business Administration", H-1; House Report No. 96-1451, p. 2, F-1. (3) Solarado, Inc.'s limited cash reserves made it impossible for the company to successfully compete in the Colorado market alongside better capitalized companies or subsidiaries of giants like Arco, Exxon, General Electric. See Senate Report No. 95-828, p. 6, E-13; "A Report to the Small Business Administration" H-1.

10/ See Senate Report No. 95-828, pp. 4, 6, 10, E-11, E-17; House Report No. 95-1071, pp. 3, 5, E-1; "Summary of a Report by Derek Hansen & Associates" in Hearings Dec. 11 and 12, 1979, p. 279,

The legislation was a qualitative rather than a quantitative remedy to overcome the obstacles in order for the U.S. to promote the commercialization of solar technologies. Though it was not known in advance what value to assign to the "greater risk," nevertheless, it was a legislative mandate for the Government to assume the "greater risk."

Evidence that the U.S. assumed the "greater risk" is first and foremost its decision to enact the atypical legislation, notwithstanding the Administrator's opposition.[11/]

In addition, the Government's assumption of the "greater risk" is discerned

F-18; Report No. 96-1451, F-1 thru F-4.
11/ See House Report No. 95-1071, pp. 7- 10, E-7; Senate Report No. 95-828, pp. 8- 10, E-14; House Hearing, March 20, 1978, pp. 4, 5, 26, G-1; Senate Hearing, April 3, 1978, p. 3, G-10; Senate Hearing, May 25 and 26, 1977, pp. 57, 61, 62, G-12; House Hearing, September 14, 1977, pp. 21, 31, G-14.

from the following substantive remedial provisions of subsection (ℓ)(7): 1. "So secured" loan condition is excluded from the loan criteria provision of the new law. 2. "As to reasonably assure repayment" implies partial assumption of risk by the lender, depending upon the actual extenuating circumstances. 3. The condition of "sound value" based primarily on "technical factors" rather than financial status, introduces qualitatively different type of consideration "as to reasonably assure repayment." 4. As mitigation of the "greater risk," which is related to improvement of competitiveness, hence repayment ability, and not unrelated to safeguarding public funds, the legislation authorized special measures for SBA to implement, which SBA failed to implement.12/

12/ See 13 C.F.R. SS 130.13, 130.14, D-4. In its Answer SBA admits "that neither SBA or its adminis-

The legislative history also indicates that the intention of Congress is that the Government assume the "greater risk."13/

Instead of following the mandate of the law, SBA shifted the entire risk

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trator made any grants under S 3" at 15 U.S.C. S 636 (d) (2) in Fiscal Years 1979 and 1980. The District Court, Carrigan, J., ruled that inter alia, 13 C.F.R. S 130.13, "involve[s] either actions committed to agency discretion or actions merely permitted by the regulations." See Order, Sept. 26, 1984, III. C., C-11.

In its oversight report, the House Committee on Small Business concluded that "SBA appears not to be following its legislative mandate" with regard to the Subcommittee finding "that no seminars have been held, nor have any training seminar grants been made." See Report No. 96-1451, October 2, 1980, part (1)(c), F-11.

13/ The Senate Select Committee on Small Business reported on H.R. 11713 that "... it is expected and intended that the SBA will take greater risk in the program created under the bill..." See Senate Report No. 95-828, p. 10, E-17; House Report No. 95-1071, pp. 8- 10, E-8. Compare H.R. 11301 (p. 2, lines 20- 25; p. 3, lines 1, 2) with H.R. 11713 (lines 8- 17): the rejection of legislative scheme which included "or so secured" and its replacement with H.R. 11713, which excluded "or so secured" and acknowledged "greater risk." D-2, D-1. See March 20, 1978 Hearing testimonies of Hon. A. Vernon Weaver, Administrator, pp. 5, 25, G-4, G-5; and Mr. Bergman, Vice President of the Solar Industries Association, pp. 37, 38, G-6; House Report No. 96-1451, October 2, 1980, i.e., "By recognizing the greater financial risk..." F-4.

onto the individual. Risk-shifting was unwarranted with respect to substantive remedial terms, legislative objective or premise.

Without the public legislative inducement, financing would have been unavailable to Solarado, Inc. for its inception. The U.S. Government, on behalf of all the people legislatively decided to bear the burden of "greater risk" in the expectation of achieving valued national goals.

B. SBA DETERMINATION TO COMPEL INDIVIDUAL TO PERSONALLY BEAR THE PAYMENT OF "GREATER RISK" ENERGY LOAN IS AN IRREBUTABLE PRESUMPTION.

The U.S. Government devised a public debt-financing scheme for risky solar energy commercial enterprise; but, shifted the public liability to the individual who represented the commercial loan applicant, without allowing the individual the opportunity to avoid the personal liability.[14/]

14/ See e.g., Bell v. Burson, 402 U.S. 535,

SBA determination to take Deed of Trust to compel personal liability is not universally applicable because an individual seeking a loan on behalf of qualified energy business is not necessarily a [residential] property owner. Nor is a person representing a company that is commercially qualified to receive a solar energy loan necessarily financially capable of assuming a [$160,000] debt many times greater than the individual could qualify for on a personal basis. Therefore,

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91 S.Ct. 1586 (1971) (requirement that uninsured motorist involved in an accident post security against damages claim without consideration of fault); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972) (State response that unwed fathers are unfit to gain custody of their natural children); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed 2d 63 (1973) (non-resident status of state university applicants for purpose of higher tuition continued for duration of university attendance); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974) (mandatory school Board rule requiring maternity leave five months before expected birth of child).

similarly situated persons who make up the class of qualified solar energy commercial loan proponents are not similarly treated.

Objective support for SBA risk-shifting determination is not found in SBELA.[15/] Despite the House and Senate Reports, promulgation of Regulations, and denouncement of the Ad-

15/ The means mandated by SBELA to achieve its national objective was opposed by the SBA Administrator, whose testimony before House and Senate Select Committees is replete with [7] reasons expressed against the proposed categorical energy loan enactment. See House Hearing, March 20, 1978, pp. 4, 5, G-1. The record shows that the final Bill that was enacted, H.R. 11713, was a new, separate composite of substantively different loan criteria forged from the legislative purpose to promote commercialization of state-of-the-art solar technologies, and to remedy old law to serve new purpose. Compare H.R. 11713 and H.R. 11301, D-1, D-2. See N. 13, supra, p. 13. See House Report No. 95-1071, pp. 3, 7- 10, E-1, E-7; Senate Report No. 95-828, pp. 9, 10, E-15. Less than two years after the Final Rules were published, the House Committee on Small Business reported on its oversight of the application of the new law that SBA was not in compliance with the mandate of the law for the purpose of promoting the energy loan program. See House Report No. 96-1451, October 2, 1980, F-6 thru F-17.

ministrator's failure to follow the
mandate of the law on certain multiple
specific grounds, the Administrator
unilaterally followed a course of action
different from that prescribed by new
law; and the U.S. leveraged the exhor-
bitant liability against the individual
person.

While the personal financial attri-
butes and status of the individual are
irrelevant in the scheme of SBELA, SBA
determination sweeps broadly and impli-
cates the fundamental right of the indi-
vidual to decide the use of a private home.

While collateral security is sub-
stantively and qualitatively excluded
from the statutory scheme and therefore
made an irrelevant legislative condition
for repayment, SBA determination includes
its consideration.

While the business concern is made
the sole subject matter of SBELA, SBA

determination renders the business concern substantially irrelevant with respect to repayment. In the statutory scheme, the business is the subject of "All loans," the entity on whose behalf the money is lent, the party to whom the liability for repayment attaches, the party to which substantive predicates of sound value defined as technical merit apply; without whose special existance there would be no commercial loan or subject for the legislation or fulfillment of legislative objective.

While "sound value" specifically defined in terms of technical factors within the statutory scheme is both necessary and sufficient to reasonably assure repayment, implicit in the SBA determination technical merit is necessary, but not sufficient.16/

16/ The Tenth Circuit Court ruling seems to imply that SBA enlarged the loan criteria in

SBA concedes the Agency did not implement certain special measures authorized by 13 C.F.R. SS 130.13 and 130.14.[17/] SBA failed to meaningfully assist the energy business to improve its financial status, or give the solar concern and industries a fair chance to develop.

In fact, SBA sustained little or no administrative stake in the vicissitudes of the U.S. assumption of "greater risk" because it exchanged the multiple uncertainties associated with the embryonic business for surety of mature home equity. Instead of duly equitable public assumption of "greater risk," petitioners were compelled to privately bear the entire burden of U.S. commercial debt-financing scheme.

SBELA to include collateral. Moreover, appellants did more than raise SBA enlargement of loan conditions on appeal, as they also raised the issue, among others, of constitutional infringement. ("The Constitutional Due Process Issue Raised by Restraint of Civil Liberty", BRIEF OF APPELLANTS, pp. 5- 7)

17/ See supra N. 12.

C. SBA OBTAINED IN PERSONAM JURISDICTION OVER PETITIONERS' LIBERTY AND PROPERTY INTERESTS IN A HOME IN THE GUISE OF ESTABLISHING IN REM JURISDICTION OVER PETITIONERS' PROPERTY INTEREST IN SOLARADO, INC.

The foundation upon which the entire legislative scheme and purpose rests is the promotion of technically sound solar energy commerce. The impetus for Reinisch to seek a solar energy loan was a growing national interest in solar energy development in view of his technical expertise and background.[18/] See supra, N. 7.

Reinisch has a property interest in Solarado, Inc. as its founder and stockholder. Solarado, Inc. had a legitimate claim of entitlement to the solar energy

18/ In late 1978, Reinisch spoke to people at the Dept. of Energy who were familiar with the new legislation and who reinforced his interest in solar energy development. He was referred to the Advocacy Office at SBA headquarters, which, in promoting the program, emphasized the technical premise and thrust of the new legislation.

loan, over which the U.S. acquired legitimate jurisdiction.

By its requirement that petitioners, personally, execute Guaranty and Deed of Trust, SBA allegedly acquired *in personam* jurisdiction over petitioners' interest in a home. SBA has no legitimate basis for compelling *in personam* jurisdiction over petitioners' interest in a home. SBA obtained undue *in personam* jurisdiction over the interest in a home in the guise of establishing reasonable jurisdiction over Reinisch interest in Solarado, Inc.[19/]

19/ In *Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed. 2d 683 (1977), this Court rejected the distinction between *in rem* and *in personam* jurisdiction based on the rationale that *in rem* jurisdiction is really

> jurisdiction over the interests of persons in a thing. *Id*, 433 U.S. at 207, 97 S.Ct. at 2581, quoting Restatement (Second) of Conflict of Laws **S** 56, Introductory Note (1971).

The *Shaffer* Court recognized that

> All proceedings like all rights, are really against persons, *Id* at N. 22, quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (1900);

which

> leads to the conclusion that in order to

The mandate of SBELA is to promote the commercialization of solar energy. To that end, SBELA provides that solar energy loans be made on the basis of sound technical value, without more. That is the only basis stipulated in the language of the law. While there is explicit basis in SBELA for SBA to acquire jurisdiction over the interest of Reinisch in Solarado, Inc. property, there is no basis in the law, expressed or implied, for SBA to acquire jurisdiction over petitioners' interest in a home.

SBA implication of home interest is a wholesale incursion for which the first traumatic effects of the deprivation began to be experienced October, 1981,

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justify an exercise in jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' Id, 433 U.S. at 207, 97 S.Ct. at 2581, quoting from Restatement.

when "Demand"[20/] was made on the "Guarantors" and liquidation was threatened.

Disparity between peitioners' interest in a home and the interest in Solarado, Inc. is so great, that the mere juxtapositioning of the two creates a paradox. Upon closer analysis the promiscuous entanglement of the two drastically different interests is discerned. The one interest in Solarado, Inc., and through it, is the claim to the energy loan, which has its source

20/ "Demand" was the "Notice of Acceleration of Due Date of Note and Demand for Payment," dated October 20, 1981 (hereinafter Demand). While Solarado, Inc. had not been able to make any payments under the promissory note from the beginning to the end of its two-year operation, between August, 1979 and July, 1981, the Demand was not a proximate consequence of the inability to pay. SBA periodically and officially certified "no adverse change in financial condition" irrespective of adversity, failure to pay, and SBA transference of the loan to "Liquidation." SBA was fully apprised of Solarado, Inc.'s financial condition from the quarterly financial statements. Of course, the foreclosure proceeding was even more remote in its allegation of "default" because the foreclosure action was begun four years after Solarado, Inc. was unable to make any payments.

in the newly enacted statute, quixotic in nature. The other interest in a home is personal, private, and enduring. It is

> so rooted in the traditions and conscience ... [of society] ... as to be ranked as fundamental, Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.ED 694 (1934);
>
> of the very essence of a scheme of ordered liberty. Palko v. State of Connecticut, 302, U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed 288 (1937).

A home belongs at once to a constellation of fundamental liberty interests and is at the core of fundamental rights that include privacy and shared intimacy, family integrity, personal security, personal and family identify, personal and family expression, and free choice.

This Court has specifically recognized within the meaning of liberty the right of the individual

> ... to marry, establish a home and bring up children ...21/ Meyer v.

21/ In part, the Meyer Court stated,

> State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1922).
>
> Generally,
>
> 'liberty' and 'property' are broad and majestic terms, Board of Regents of State College v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 2706, 33 L. Ed. 2d 548, 553 (1972),

that speak to the expansiveness of the Constitution. Griswold v. State of Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed. 2d 510 (1965). The reasonable extension of the right, "to marry, establish a home and bring up children," is the right to preserve a marriage, an established home and a parent/child relationship. Stanley v. Illinois, 405 U.S.

> ... it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Ibid.

645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

A home is the embodiment of the highest values and aspirations of a person; it is the actualization of fundamental interests that would be mere abstractions without a home. The establishment of a home is a mode of free expression of a personality, a personal creation of free choice: it is an extension of a person's identity and the imprint of a family's existance. To establish a home is the security and freedom to choose stability and permanence in living for the sake of family integrity. Griswold, supra, 381 U.S. at 496, 85 S.Ct. at 1682.

The security of a home derives protection from more than one source in the Bill of Rights. The Fourth,

Fifth and Third Amendments and to some extent, the First Amendment, are sources of protection of a home liberty, Bowers v. Hardwick, ___ U.S. ___, ___, 106 S.Ct. 2844, 2852 (1986) (BLACKMUN, J., dissenting), because of the meaning a home holds for a person's security and quality of life. Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510 (1967).

It is not the

> whole domain of social and economic fact, Board of Regents, supra, 408 U.S. at 571, 92 S.Ct. at 2706,

as it relates to concepts of "liberty" and "property" beating a wide path to the front door of a home that exacts this Court's heightened scrutiny, Bowers, supra, 106 S.Ct. at 2846; but, rather it is the keystone of fundamental interests as it

> form[s] so central a part of an individual's life. Bowers, supra, 106 S.Ct. at 2852 (BLACKMUN, J., dissenting).

Privacy, family life, marital intimacy, security, a home are spoken of in a single breath; they are of one matrix. "Privacy," as it relates to the right, "to marry, establish a home and bring up children," has received this Court's steadfast protection in a long line of cases that

> deal with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. Bowers, supra at 2858 (STEVENS, J., dissenting opinion) quoting from Fitzgerald v. Porter Memorial Hospital, 523 F. 2d 716, 719- 20 (CA 7, 1975); Id, at 2850;

Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922); Pierce v. Society of the Sisters of the Holy Names, Etc., 268 U.S. 510, 45 S.Ct. 571 (1925); Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 L.Ed.

2d 147 (1973); Cleveland v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 2d 531 (1977); Carey v. Population Services Intern., 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); Thornburgh v. American College of Obstetricians, ___ U.S. ___, 106 S.Ct. 2169 (1986).

The interlink of rights a person naturally has in a home, marriage, family and children, and privacy has occassioned the Court more than once to be explicit in describing the Fourth and Fifth Amendments as

> protections against 'all government invasions of the sanctity of a man's home and the privacies of life.' Griswold, supra, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681; Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

And, in pertinent part, Mr. Justice Harlan stated,

> ... if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right ... Poe v. Ullman, 367 U.S. 497, 552, 81 S.Ct. 1752, 1781 (1961) (dissenting opinion).

SBA obliteration of a home strikes at the fundamental rights so intertwined. With the exploitation of a home comes a suspension of the family's existential happiness somewhere between actuality and illusion, such

> that neither liberty nor justice ... exist ... Palko v. State of Connecticut, 302 U.S. 319, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

When the U.S. Government is wittingly the encroacher into the personal security of a home, an overwhelming blow is dealt to the highest, deepest-rooted, universally-felt societal values.

D. THE U.S. DEPRIVED PETITIONERS OF LIBERTY AND PROPERTY RIGHTS WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME IN A MEANINGFUL MANNER

Whenever a person faces deprivation of "liberty" or "property" interests it is a basic requirement of due process that he be given notice and an opportunity to be heard. The "Notice" and "Hearing" must be provided "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

There are two critical periods in the circumstances of the present case when petitioners' rights were adversely implicated by governmental action. The first occassion was between February and July, 1979 when the Solarado, Inc. application for a solar energy loan was submitted, reviewed and approved. The second occassion began with the Demand on Guarantors in October, 1981 for payment of the $160,000

Solarado, Inc. indebtedness; and culminated in the foreclosure of petitioners' home in May, 1986.

1. Promulgation of Regulations was mandated by the new statute at 15 U.S.C. S 636(ℓ)(8)(A)(B).[22/] The "loan Criteria" regulation, S 130.7, was promulgated in form only, for it was not substantive Notice of the Administrator's actual requirement to "so secure" the energy loan for repayment. The expressed substance of the law merely required "sound ... technical ... value" ... "as to reasonably assure repayment."

Neither the public, petitioners, nor Congress was given Notice of SBA intention to include "so secured" as

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22/ Final Rules were published at 13 C.F.R. Part 130 in the Federal Register, Vol. 44, No. 4- January 5, 1979, pp. 1369- 1372 (proposed Rules, Vol. 43, No. 172, September 5, 1978, pp. 39394- 6).

The "Loan Criteria" provision, S 130.7, was verbatim recital of the corresponding provision in the statute at sub-subsection (7) of subsection (ℓ).

a condition. Without substantive Notice, no person had the opportunity to challenge, debate, oppose, correct erroneous administrative construction of the provision; or to appropriately and defensively avoid personal jeopardy.

Without knowledge of requirement of "so secured" condition of energy loan, petitioners were induced, at their great peril, to seek a "greater risk" energy loan on an assumed basis that was entirely false, incomplete, misleading and erroneous. Petitioners were deprived of substantive prior public Notice of and forum for objective and uninhibited response to perilous, extraneous, and unduly burdensome conditions.

Despite the disorderly Solarado, Inc. loan processing, throughout the six monthlong engagement from February through July, 1979, the entire focus was on the business attributes of Solarado,

Inc. SBA required multiple revisions of the Business Plan and Projections, ad nauseum.

The first time that SBA introduced the "Guaranty," "Warranty Deed," "Deed of Trust" was simultaneous with transmittal of the package of documents for signatures. The precipitative timing and obscurated manner of their introduction precluded discrimination between the solely commercial basis of the loan and the imperceptible shift of the commercial risk onto petitioners, personally. See infra Part "E" for detailed discussion.

Petitioners were deprived of the right to make their own decision about the use of their private home, based on pertinent information provided at a meaningful time in a meaningful manner, with regard to personal assumption of liability for the Solarado, Inc. loan. SBA wholly deprived them of the oppor-

tunity to make a private decision of such a deeply personal nature and enormous magnitude that it would affect the security and destiny of their family for the rest of its life. See supra, Part "C".

2. Demand[23/] on Guarantors initiated a yearlong "liquidation" engagement so devoid of any procedural safeguards as to amount to "cruel and unusual punishment." The initial trauma upon receipt of the Demand reverberated for many years afterwards. The Demand was a personal threat upon petitioners' private interest in the security of a home.

> While it has long been recognized that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it, Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 170- 172, 71 S.Ct. 624, 647- 649 (1951) (FRANKFURTER, J., concurring),

23/ Supra, N. 20.

the insular world of SBA ex parte loan liquidation has eluded the constitutional imperative of due process articulated by Mr. Justice Frankfurter.

SBA liquidation[24/] was a procedural vacuum during which Shelley Reinisch[25/] was subjected to the whims and caprices of SBA officials; which was infected with undocumented invasions of privacy and haunting indignities; and at its extreme, it was torturous and dehumanizing.

The sole purpose of SBA liquidation is to drive the individual to surrender his/her property. During the year after the Demand was made on the Guarantors, Shelley Reinisch was subjected to the ordeal that SBA refers to as "Crisis Management" in its Standard Operating

24/ See Affidavit, #'s 20- 23, I-16.
25/ The Reinisch family was separated for three years because Ronald Reinisch was employed in Minnesota while SBA enforced the lien on the home in Colorado.

Procedures.[26]

The liquidation was open-ended; while there was a single prior Notice, i.e., the Demand letter, SBA did not provide a meaningful opportunity to be heard in rational and reasonable response to SBA ex parte conclusions.[27]

26/ "Crisis Management" is a psychological manipulative technique to obtain the obligor's "cooperation" to Agency collection ends. By SBA's own suggestion, the liquidation officer may "accelerate" and "decelerate" the pressure accordingly. Of course, every person has an individual breaking point, and Shelley Reinisch cannot reconcile the knowledge of two deaths that occurred while the people were engaged in SBA liquidation over a solar energy loan. The personal experience of being subjected to SBA's formula "Crisis Management" was not comparable to any other experience she ever had or could imagine; but, it more nearly approximates extreme threat to personal integrity.

27/ E.g., they received a one-paragraph written decision that stated conclusively that the Reinisch proposal[s] to settle the loan was declined because the Government could essentially obtain a greater recovery of funds by "enforced collection." There was no evidence that this decision had been arrived at rationally by District Colorado or Region 8 SBA officials, and neither one of the three persons on a "sham" committee had signed the letter or was available to discuss the decision. Rather, it appears as if higher government officials in Washington, probably outside the agency, had dictated end results

Presumed to act with full knowledge, the Federal Government irrationally and senselessly

> condemned [petitioners] to suffer grievous loss, Id, 341 U.S. at 168, 71 S.Ct. at 647;

denied petitioners opportunity to have a meaningful individualized hearing before an impartial arbiter; and in effect, rendered petitioners as helpless as an inanimate object. The notions that petitioners brought with them to SBA liquidation— concepts of fundamental fairness, dignity of rational thinking and national committment to "higher values," Stanley v. Illinois, 405 U.S. at 657, 92 S.Ct. at 1215,— were hopelessly eradicated.

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for enforced debt collection, and local SBA officials merely performed a perfunctory task in carrying out the faceless dictum. Due to the immutable SBA position, many officials appeared frozen with fear, and no one ever uttered the dreaded word, "foreclosure." See Affidavit #21, I-16.

E. PERSONAL SIGNATORY DOCUMENTS ARE TAINTED EVIDENCE OF LIABILITY FOR THE COMMERCIAL LOAN BECAUSE THEY WERE TAKEN WITHOUT PETITIONERS' INFORMED CONSENT IN VIOLATION OF A REASONABLE EXPECTATION OF PERSONAL PRIVACY WITH REGARD TO FUNDAMENTAL LIBERTY AND PROPERTY INTEREST IN A HOME.

The reading of Fourth Amendment constitutional protection in the earliest case[s] was broad and liberal, Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886),

> so as to prevent a stealthy encroachment upon or 'gradual depreciation' of the rights secured by them by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers. Gouled v. United States, 255 U.S. 298, 304, 41 Sup. Ct. 261, 263 (1921).

Rights of

> ... personal security, personal liberty and private property...

were regarded as important and as indispensible as

> ... the right to trial by jury, to the writ of habeus corpus, and to due process of law. Id.

The protection is afforded ubiquitously

because, as Mr. Justice Stevens stated in a dissenting opinion in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 471, 101 S.Ct. 2460, 2468, 69 L.Ed. 158 (1981),

> liberty itself survives to some extent and its deprivation is a continuous process rather than an isolated event.

In Elkins v. United States, the Court stated that

> the professed object of the trespass rather than the official character of the trespass should test the rights of government, 364 U.S. 206, 215, 80 S.Ct. 1437, 1443 (1960), N. 7, quoting CARDOZA, Judge, in People v. Defore, 242 N.Y. 13, 22- 23, 150 N.E. 585, 588;

as the Court a century ago in Boyd recognized that the proceeding to forfeit goods,

> though technically a civil proceeding is in substance and effect a criminal one

within the meaning of that part

> of the Fifth Amendment which declares that no person shall be compelled in

> any criminal case, to be a witness against himself,
>
> ... and is the equivalent of ... unreasonable search and seizure within the meaning of the fourth amendment. Boyd, supra, 116 U.S. at 634, 635, 6 S.Ct. at 534, 535.

That the Fourth Amendment prohibits

> all unreasonable searches and seizures, Gouled, 255 U.S. at 305, 41 S.Ct. at 263,

regardless

> whether the taking was effected by force, by fraud, or in an orderly process of a Court's procedure, Olmstead v. United States, 277 U.S. 433, 477- 478, 48 S.Ct. 564, 572 (1928) (BRANDEIS, J., dissenting),

is its touchstone.

The object of the statute declared unconstitutional in Boyd was to enable the Government to collect unpaid revenues on imported goods. SBA objective in the present case is presumably to collect money owed to the Government on account of commercial indebtedness. The means used in first case of this type, compulsory production of private papers, resembles the means

the Agency uses in the present case, compulsory inducement of personal evidential material. In both cases the object is to obtain in personam evidence for a forfeiture[28/] of private property.

In the present case, the first time petitioners were presented with their alleged liability as "Guarantors" was on October 26, 1981 when "Demand" was made on them. This was a traumatic surprise because they were not personally liable for the Solarado, Inc. debt. They immediately recognized that their name and persons had been unfairly and erroneously implicated;[29/] not only without their voluntary and informed consent, but also taken out of the origi-

28/ Forfeiture is also a legitimate penalty when a person is convicted of having obtained property illegally. Although no criminal charge was brought, and neither Reinischs nor Solarado, Inc. has concealed any property in order to avoid liability, this "civil" forfeiture obtains the same result.

29/ See Affidavit, #19, I-15; #4, I-3; #7, I-5; #8, I-6; #9, I-7; #11, I-8.

nal statutory context that is based on governmental assumption of "greater risk" of energy loans.

In their lives petitioners secured "ordered liberty" through pursuit of knowledge and objectivity in the conduct of their affairs. They consider the "search and seizure" to be an unconscionable invasion of their minds; it is an affront to their intelligence; and against their free wills to have been denied the vital information they needed to make a personal, prudent and objective decision with regard to matters of family security and privacy.

Encroachment into the security of petitioners' private life was taken under the guise of applying new law, which SBA controlled. By its delegated authority, it limited the public and individual access to information material to promotion of the new law;

and the opportunity for meaningful public response to the new law. Through its contolling position, SBA denied petitioners the freedom to make a knowledgeable private decision whether or not the statutory entitlement is an unbearable personal burden and an unreasonable use of private property.

SBA conducted a covert search and seizure of personal signatory evidence, without informing petitioners in advance of the fact, basis, purpose or need of personal documents. Petitioners were the unwilling and unwitting source of the signatory evidence only because the signatures were acquired in total obfuscation.

While the Government's "professed object," in rem jurisdiction over Solarado, Inc., was sanctioned by law, SBA unilaterally acquired unconstitutional jurisdiction over petitioners in personam for the

purpose of enforcing a penalty forfeiture of a home in the event of business default. The law provides the inducement that SBA used as a camouflage to compel petitioners to produce personal papers and signatures that would be used against them for a forfeiture of a home.

Mr. Justice Brandeis stated in a dissenting opinion in Olmstead v. United States that,

> men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty work in insidious encroachment by men of zeal, well meaning but without understanding. 277 U.S. 433, 479, 48 S.Ct. 564, 572- 573 (1928).

Establishment of in personam jurisdiction was obfuscated by SBA legitimate establishment of in rem jurisdiction and conduct of justified search with regard to the Solarado, Inc. loan qualification. For six months beginning in February, 1979, SBA fully controlled

and manipulated the Solarado, Inc. loan-making for its own cryptic ends while ostensibly establishing in rem jurisdiction over Solarado, Inc.

The in personam intrusion began with the "search" of the Personal Financial History of petitioners on Form 912.30/ From its inspection of Form 912, SBA acquired private information about Reinisch ownership of jewelry, pictures, automobiles and home equity, and indebtedness. This was an "unreasonable search" because petitioners had "a reasonable expectation of privacy" that when making a public corporate energy loan, personal financial attributes would not be exploited for public purpose. Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967) (HARLAN, J., concurring

30/ The apparent purpose for the 912 was to determine if the individual representing the business is of good and reliable character and standing in the community.

opinion). At a later date, contextually remote from the production of Form 912, petitioners were required to produce their Home Warranty Deed for SBA inspection.

The "seizure" was the compulsory inducement of petitioners' signatures on the Deed of Trust and Guaranty, which led to the Demand upon Guarantors; and the consummation in the foreclosure of petitioners' interest in a home. This sequence of events is a "seizure" of person, property and liberty because there is

> meaningful interference with an individual's possessory interests in that property.31/ United States v. Karo, 468 U.S. 705, 712, 104 S.Ct. 3296, 3302, 82 L.Ed. 2d. 530 (1984) quoting United States v. Jacobsen, 466 U.S. at 113, 104 S.Ct. at 1656.

31/ Supra, N. 25. Peitioners were deprived of normal use of a home and suffered impairment of family life when they were unable to move their home to another state where employment was obtained.

The unreasonableness of the seizure is U.S. exploitation of personal documentary signatures rather than their mere existance. In the context of the Solarado, Inc. energy loan it is unreasonable to contemplate that the Government would exploit private home ownership to finance the greater commercial risk public energy loan.

Only once, near the end of the six monthlong loan processing engagement (between February and July, 1979), was personal security alluded to. The occassion was June 12, 1979 in a telephone conversation during which Solarado, Inc.'s first loan officer (Don Furtivo) mentioned approximately 16 miscellaneous items, among which he ambiguously and vaguely noted "lien on company; lien on residence."[32/] The abstruse initial "notice" in a telephone conversation nevertheless

32/ Evidence for the conversation is 1½ pages of handwritten notes taken during the conversation.

prompted Ronald Reinisch to inquire orally of both Don Furtivo and Martin Hime, the second loan officer assigned to Solarado, Inc.,

> Will I lose my house if the business fails?

Face-to-face on two separate occassions, both officers assured petitioner[s] that the house would not be at risk.[33/] In any case, Mr. Furtivo's oblique mention of "liens" did not constitute meaningful or official "Notice" of the untimely and totally obscured "seizure" of signatures on the Guaranty and Deed of Trust that

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33/ In deposition testimony, Ronald Reinisch recounted the following (composite) response of the loan officers:

> I was then told that there would be a workout plan and it was not their policy to seize houses, and that the lien on the residence should be considered an act of good faith on the part of the borrower, and that the SBA forecloses only in case of fraud by the borrower. p. 91, lines 1- 6, March 31, 1984.

In fact, SBA Standard Operating Procedures forbid the taking of primary residence as collateral "except in the most compelling circumstances," as for example when the business is operated out of the house.

followed.

While "lien on company; lien on residence" had been unofficially mentioned on June 12, 1979, the first introduction of "Guaranty," "Warranty Deed," and "Deed of Trust" was their precipitative appearance among the 13 randomized, assorted papers produced for signatures after July 25, 1979.[34/] The documents were signed

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34/ The cover sheets listed the following on page 2:

> 10. Guaranty of you and your wife. Please sign this form where indicated and insert the date of SBA Note where required. Return the original to SBA.
> Prior to disbursement of your loan you must submit to SBA the following:
> ...
> d. Warranty Deed covering your property at 5662 So. Hanover Way, Englewood, Colo. so we may prepare the Deed of Trust.

The Loan Authorization and Loan Agreement (Direct Loans) document listed the following on page 4, section 3. "Terms of Loan," sub-section "(f) Other provisions," #6, as follows:

> 6. Guaranty of Ronald F. and Shelley G. Reinisch for 100% of the unpaid balance of the loan, secured by Deed of Trust on 5662 South Hanover Way, Englewood, Colorado, subject to a prior lien held by Western Federal

on August 13, 1979 by petitioners in the security of a home, except the Deed of Trust, which was executed on August 22nd.

SBA's telescopic arrangement and introduction of sensitive personal documents imminently coincidental with their execution left no time for petitioners to respond or even to deliberate. Having been warned once before, and reminded again when the documents were transmitted, that the funds are allocated strictly

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Savings and Loan, in the approximate current amount of $49,792.00 ...

Note the obscuration of the most sensitive personal documents by their respective placements exactly midway, at #10 in a listing of 19 randomly arranged items on the cover letter; at #6 in a listing of 12 randomly assorted items in the "(f) Other provisions" part of Loan Authorization and Agreement (Direct Loans). Most of the other items on both lists were pertinent to the business. Note also that the "Guaranty" was not listed under subsection "(c) Collateral" (Section 3, "Terms of Loan"); but, rather was inserted under miscellaneous items of subsection "(f) Other provisions." It appeared as if SBA did not intend "Guaranty" and "Deed of Trust" to be collateral conditions according to its exclusion from the "(c) Collateral" subsection. Note also that the three items listed under "(c) Collateral" were of a commercial nature. See Affidavit #13, I-9.

according to an applicant's place in the queue, to have delayed on the execution would have surely meant relinquishing Solarado, Inc.'s claim to appropriated funds.35/

SBA did not provide any procedural protection that would safeguard fundamental liberty and property interests in order to prevent their erroneous deprivation or unjustified impairment. There was no meaningful opportunity for petitioners to be heard. Nor was there opportunity to obtain official, reliable and binding information from SBA. In effect there was an informational vacuum, i.e., nothing in writing or communicated publicly, no bilateral exchange whatsoever. In fact, SBA avoided any forum or official private communication in which security conditions might have been noticed, disclosed,

35/ See House Report No. 96-1451, "(a) Inadequate funding," F-6.

questioned, inquired about, debated or refuted.[36/]

The only instance during the entire loan proceedings in which an apparent opportunity was provided for petitioners to express their intention with regard to security conditions was when Solarado, Inc. answered, "NO", to the critical question,

> Do you have any co-signers and/or guarantors for this loan? Reverse side Loan Application, question #7, dated June 6, 1979.

That negative answer was the only voluntary written expression of petitioners' true and emphatic intention, but secretly and unilaterally, SBA abrogated its import for petitioners.

The Solarado, Inc. loan execution amounted to a compulsory inducement

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36/ Supra, N. 12. SBA absolutely declined to be accountable for the implementation of SBELA. Interested persons were starved for information about the new loan program, but, like beggars, had to pick up tidbits wherever found.

of petitioners' personal signatures on private papers. The personal signatures were obtained without petitioners' informed consent with regard to their intended use in violation of the right of every individual

> to the possession and control of his own person, free from all restraint or interference of others, unless by clear or unquestionable authority of law. Terry v. State of Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1873 (1968), quoting from Union Pac. R. Co. v. Botsford, 141 U.S. at 251, 11 S.Ct. at 1001, 35 L.Ed. 734 (1891).

Petitioners were surely denied control of their own decisionmaking prccesses because SBA denied them access to vital information that was under the Agency's privileged control. Petitioners were wholly deprived of public or private Notice or public or individualized opportunity to be heard at a meaningful time in a meaningful manner. See supra, "D".

Personal signatures were obtained

by deception, subterfuge, obfuscation, concealment, disinformation, misinformation, and exploitation in stealthy violation of a person's fundamental constitutional liberty and property right to decide for what purpose a private home is used.

SBA officers first furtively searched petitioners private papers; and secondly, induced compelling execution of personal documents. When the U.S. ultimately used the documents as evidence in a penalty forfeiture proceeding of the Reinisch home, it is presumed to

> having full knowledge. Olmstead v. United States, 277 U.S. 433, 483, 48 S.Ct. 564, 574 (1928) (BRANDEIS, J., dissenting opinion).

The U.S. compelled each petitioner to be a witness against him/herself in a "civil" penalty forfeiture proceeding without bringing any criminal charges against them or showing either a compelling governmental necessity, objective

justification or authority. Used against the petitioners in a penalty forfeiture legal proceeding, the U.S. compelled production of self-incriminating signatory testimony.37/

37/ On July 7, 1983 the U.S. filed a Complaint to obtain a judicial foreclosure of petitioners' home. Attached to the Complaint, and made part of it, was the U.S.'s entire material evidence consisting of both Reinisch' personal signatures on the Guaranty and Deed of Trust.

There was not a single Hearing, nor was there a Trial before an impartial arbiter; nor was there a Finding of Fact.

On October 15, 1985 the U.S. filed a RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT wherein it was stated, "It should be noted that defendants do not contest the authenticity of their signatures on all pertinent documents ..."

The U.S.'s "authentication" of the Reinisch signatures was obtained in violation of petitioners' Fifth Amendment right against compulsory self-incrimination. Both the Government lawyer and defendants' lawyer helped to provide the U.S. with petitioners' "confession" of authenticity of signatures.

Defendant Ronald Reinisch was compelled to answer questions he believed to be self-incriminating when his lawyer stated on several occassions to both defendants,

> She's entitled to ask every question she wants to without- just you be quiet too- without any commentary or editorials. Just answer the question [she] asked. [emphasis added] Deposition of Ronald Reinisch, March 31, 1984, p. 81, lines 13- 16.

The United States of America brought an action for judicial foreclosure of petitioners' home under Title 28 U.S.C. S 1345. The U.S. lawsuit raised constitutional questions implicitly and explicitly set forth in petitioners' FIRST AMENDED COMPLAINT, for which jurisdiction is pursuant to Title 18 U.S.C. S 1331(a) and Title 15 U.S.C. S 634(b)(1).

Moreover, both Reinischs were compelled to give their deposition testimonies before the U.S. filed an Answer on April 16, 1984 to petitioners' Complaint. Both Shelley and Ronald Reinisch submitted to the taking of their depositions before the U.S. filed its Answer out of fear that their own lawyer would bring sanctions against them for "non-compliance."

Shelley Reinisch balked repeatedly at confessing the authenticity of her signature[s] because these confessions were forced in isolation from and outside of the context of circumstances and fact in which they were originally executed. In a pleading, the U.S. produced these "confessions of authenticity of signatures" in a manner that was so totally removed from their relevant context as to be meaningless.

REASONS FOR GRANTING WRIT

Whether or not the U.S. has deprived petitioners of liberty and property without due process and by unjustified search and seizure are questions that should be settled by this Court in harmony with applicable decisions of this Court pursuant to Rule 17.1(c).

While the Tenth Circuit has not found anything in SBELA that prohibits SBA from taking a home as collateral to secure an energy loan, the Fifth Amendment prohibits SBA from impairing a person's security and liberty interests in a home

> with reference to certain decisions that are properly for the individual to make. Bowers v. Hardwick, ___ U.S. ___, ___, 106 S.Ct. 2841, 2850, (1986) (BLACKMUN, J., dissenting);

and the Fourth Amendment prohibits the federal government from invading a person's

> indefeasible right of ... security, liberty ... and private property. Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

This Court has long recognized that privacy and security interests associated with family, marriage and a home deserve constitutional protection. In the present case, the federal government violated the sanctity of a home and the private and secure way of life that a home promotes.

In circumstances of other cases, invasions of private areas of a home, a doctor's office, a phone booth were directed at certain specific prohibited private activities sheltered by the private areas. e.g., United States v. Karo, 468 U.S. 703, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967).

The present case presents a broad, indiscriminate invasiveness by blunt, wholesale strike at the establishment

of a home that endows family and marriage with privacy and security for all the activities of life associated with a home. Because the privacy and possessory interests in a home are ingrained in the conscience and tradition of society there is reasonable expectation for that interest to remain inviolate.

The expectation for privacy is not contravened by the substantive law of SBELA, which mandates governmental assumption of "greater risk," in rem jurisdiction over Solarado, Inc. "as to reasonably assure repayment," and substantive public rulemaking; rather, SBELA implicitly allows the expectation of privacy and security of a home interest. The private character and importance of a home are not altered or diminished by the commercial public nature of the energy loan entitlement; but, rather it is reasonable to expect that a home

exists independently of the vicissitudes of a governmental commercial energy loan. It is incomprehensible that as as condition of accepting a legitimate claim of entitlement to a public energy loan a person forfeits freedom to decide the use of a fundamentally personal interest in private home property.

CONCLUSION

Based on the foregoing, petitioners urge this Court to grant their petition for writ of certiorari.

Respectfully submitted,

SHELLEY G. REINISCH, PRO SE

By Shelley G. Reinisch
Shelley G. Reinisch

RONALD F. REINISCH, PRO SE

By Ronald F. Reinisch
Ronald F. Reinisch

% S. Pallay
9050 Union Turnpike
Glendale, N.Y. 11385

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 86-1931
	)	(D.C. No.
SOLARADO, INC., a Colorado corporation,	)	83-C-1240)
	)	(D. Colo.)
	)	
Defendant,	)	
	)	
RONALD F. REINISCH; SHELLEY G. REINISCH,	)	
	)	
Defendants-Appellants,	)	
	)	
and	)	
	)	
THE PUBLIC TRUSTEE FOR THE COUNTY OF ARAPAHOE, STATE OF COLORADO; CASTLEWOOD SANITATION DISTRICT; COLLECTION BUREAU, INC., a Colorado corporation,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

Before MOORE and TACHA, Circuit Judges, and BRIMMER, Chief Judge. *

---

* Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8. The cause is therefore ordered submitted without oral argument.

This is an appeal from a judgment of foreclosure entered by the district court in favor of the United States with respect to certain real property owned by defendants Ronald and Shelley Reinisch. Defendants had pledged the property as security for a loan made to Solarado, Inc. under the Small Business Energy Loan Act (SBELA), 15 U.S.C. S 636(1).

The sole issue raised on appeal is whether the Small Business Administration

(SBA) violated the SBELA and its own regulations by requiring the Reinisch property as collateral. We hold that it did not. While the SBELA does express Congress' intent to have SBA evaluate aspiring energy ventures by giving more weight to their technical and commercial merit than to their collateralization, see 15 U.S.C. S 636(1)(7), nothing in the SBELA prohibits SBA from requiring collateral as one of the terms in any loan it ultimately makes to an enterprise that has satisfied the criteria in S 636(1)(7).

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOLARADO, INC., a Colorado corporation, RONALD F. REINISCH, SHELLEY G. REINISCH, PUBLIC TRUSTEE FOR THE COUNTY OF ARAPAHOE, STATE OF COLORADO, CASTLEWOOD SANNITATION DISTRICT, COLLECTION BUREAU, INC., a Colorado Corporation,

Defendants.

JUDGMENT AND DECREE OF FORECLOSURE

This Court has jurisdiction over the subject matter and the parties.

The plaintiff was awarded summary judgment on all issues on April 30, 1986.

The Court finds that the note of Solarado, Inc., to the Small Business Administration is in default and that the Security Agreement pledging collateral is

in default, as is the Deed of Trust securing the property described as:

> Lot 9 and that part of Lot 8, described as follows: Beginning at the common rear corner of said Lots 8 and 9, thence Northwesterly along the common lot line of said Lots 8 and 9 a distance of 171.54 feet to the Southerly right of way line of South Hanover Way; thence Westerly along a curve to the left having a radius of 200.0 feet and a central angle of 1° 47'7" an arc distance of 6.23 feet; thence Southeasterly and radially a distance of 171.75 feet to the point of beginning, all in Block 15, SUNDANCE HILLS FILING NO. SIX, County of Arapahoe, State of Colorado.

The plaintiff is entitled to a decree of foreclosure on the real property covered by the deed of trust. This property is known as 5662 South Hanover Way, Englewood, Arapahoe County, Colorado.

The Court further finds that the guaranty of defendants Ronald F. Reinisch and Shelley G. Reinisch is in default and that plaintiff is entitled to a decree of foreclosure on the real property covered by the Solarado deed of trust.

The Court further finds that in addition to plaintiff, the defendant Public Trustee for the County of Arapahoe filed a disclaimer as to the property on August 16, 1983. Defendants Castlewood Sanitation District and Collections Bureau, Inc., defaulted.

1. Plaintiff is granted judgment against defendants Solarado, Inc., Ronald F. Reinisch and Shelley G. Reinisch in the amount of $223,060.85; plus postjudgment interest at the legal rate of 6.31%.

2. Judgment is entered against Castlewood Sanitation District and Collections Bureau, Inc., foreclosing all rights, claims, or interest in the property ordered sold below, including right of redemption.

3. The plaintiff has valid deed of trust on the real estate described as

> Lot 9 and that part of Lot 8, described as follows: Beginning at the common rear corner of said Lots 8 and 9, thence Northwesterly along the

common lot line of said Lots 8 and 9 a distance of 171.54 feet to the Southerly right of way line of South Hanover Way; thence Westerly along a curve to the left having a radius of 200.0 feet and a central angle of 1°47'7" an arc distance of 6.23 feet; thence Southeasterly and radially a distance of 171.75 feet to the point of beginning, all in Block 15, SUNDANCE HILLS FILING NO. SIX, County of Arapahoe, State of Colorado.

The deeds of trust of the plaintiff are foreclosed against the above property. Plaintiff also has valid security agreements covering the property described as follows:

All equipment and machinery, including power driven machinery and equipment, furniture and fixtures now owned or hereafter acquired, together with all replacement thereof, all attachments, accessories, parts, and tools belonging thereto or for use in connection therewith, AND

All inventory, raw materials, work in process and supplies now owned or hereafter acquired, AND

All accounts receivable now outstanding or hereafter arising.

4. a. The Clerk of the Court shall issue his order of sale commanding the

United States Marshal to seize and sell the property described above at public auction in accordance with 28 U.S.C. SS 2001 and 2002.

b. Notice shall be published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in Arapahoe County, Colorado. Said notice shall describe the property as set out in paragraph 3 above and shall contain the terms and conditions of sale as set out herein.

5. The terms and conditions of the sale shall be as follows:

a. The U.S. Marshal shall conduct his sale on the site of the property described in paragraph 3.

b. The United States may bid a credit against its judgment and interest thereon, costs and expenses without tender of cash, as provided by 31 U.S.C. S 195.

c. The terms of sale as to all other persons or parties bidding shall be cash. The successful bidder, called purchaser herein, shall be required to deposit with the United States Marshal cash equal to twenty percent of his total bid immediately upon the property being struck off and awarded to him as the highest and best bidder; the remaining eighty percent of said purchase price shall be paid on or before 5:00 p.m., ten days inclusive, of the date of sale. Should any person bid off property at sale by virtue of this judgment and order of sale and fail to comply with the terms of the sale, he shall be liable to the United States of America for twenty percent of the value of the property thus bid off as a penalty, besides costs, to be recovered on motion, five days notice of such motion being given to such purchaser. Where the purchaser fails to comply with the terms of the sale, said deposit by pur-

chaser shall be paid over and delivered to the United States of America to be applied toward payment of said penalty, but payment of said penalty by purchaser shall not be a credit on the judgment of the United States of America against the defendant. Should the property on second sale bring less than on the former, the defaulting purchaser at first sale shall be liable to pay the United States all loss which it sustains, including the amount of the difference between the bid at the first sale and bid under which the property finally sold to be recovered on motion.

d. The United States Marshal shall make his report of sale within ten days from the date of sale.

6. If no objections have been filed in writing in this civil action with the clerk of the court by 10:00 a.m., fifteen days inclusive from the date of sale, the

sale shall become final without necessity of motion, and the United States Marshal shall be directed to deliver his deed to said purchaser.

If defendant Ronald F. Reinisch and Shelley G. Reinisch file with the Clerk of the Court, the U.S. Marshal, and plaintiff's counsel, within the aforesaid fifteen days, a notice of intent to redeem, the Marshal shall issue a certificate of purchase to the purchaser and hold in abeyance the issuance of a deed pending further order of the court on the matter of redemption.

7. The United States Marshal shall apply the proceeds of sale first to expenses of sale, then to payment and satisfaction of this judgment as set forth herein. If the property shall sell for more than the amount sufficient to pay off and satisfy said sums of money, then the U.S. Marshal shall be directed to pay over the

excess to the registry of the Clerk and to notify the parties in this civil action.

If the aggregate proceeds from sale, less expenses, are less than the amount of this judgment, then plaintiff shall obtain a deficiency judgment upon application to the court.

DATED at Denver, Colorado this 7 day of May, 1986

BY THE COURT:

JIM R. CARRIGAN, Judge
U.S. District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOLARADO, INC., a Colorado corporation, RONALD F. REINISCH, SHELLEY G. REINISCH, PUBLIC TRUSTEE FOR THE COUNTY OF ARAPAHOE, STATE OF COLORADO, CASTLEWOOD SANITATION DISTRICT, COLLECTION BUREAU, INC., a Colorado Corporation,

Defendants.

ORDER OF SALE

TO THE United States Marshal, District of Colorado-Greeting:

WHEREAS, the United States of America, on the 7th day of May, 1986, in the United States District Court for the District of Colorado, received a judgment as follows:

1. The United States of America, does hereby have and recover judgment for the sum of $223,060.85 which is the balance of in-

terest and principal due as of April 30, 1986, plus legal interest since the date of judgment, and

2. The deed of trust of the United States is foreclosed against the property known as 5662 South Hanover Way, Englewood, Colorado 80110 and more specifically described as:

> Lot 9 and that part of Lot 8, described as follows: Beginning at the common rear corner of said Lots 8 and 9, thence Northwesterly along the common lot line of said Lots 8 and 9 a distance of 171.54 feet to the Southerly right of way line of South Hanover Way; thence Westerly along a curve to the left having a radius of 200.0 feet and a central angle of 1° 47'7" an arc distance of 6.23 feet; thence Southeasterly and radially a distance of 171.75 feet to the point of beginning, all in Block 15, SUNDANCE HILLS FILING NO. SIX, County of Arapahoe, State of Colorado.

THEREFORE, YOU ARE COMMANDED to seize and sell the property at public auction, in accordance with 28 U.S.C. SS 2001 and 2002.

a. Notice shall be published once a week for at least four weeks prior to the

sale in at least one newpaper regularly issued and of general circulation in Arapahoe County, Colorado. Said notice shall describe the property as set out above and contain the terms and condition of sale as set out herein.

b. The terms and conditions of the sale shall be as follows:

(1) The sale of the property shall be he held on the property site.

(2) The United States may bid a credit against its judgment and interest thereon, costs, and expenses without tender of cash, as provided by 31 U.S.C. S 195.

(3) The terms of sale as to all other persons or parties bidding shall be cash as follows: The successful bidder, called purchaser herein, shall be required to deposit with the United States Marshal, cash equal to twenty percent of his total bid immediately upon the property being struck off and awarded to him as the highest

and best bidder; and the remaining eighty percent of said purchase price shall be paid on or before 5:00 p.m., ten days, inclusive, of the date of sale. Should any person bid off property at sale by virtue of this judgment and order of sale, and fail to comply with the terms of the sale, he shall be liable to the Untied States of America for twenty percent of the value of the property thus bid off as penalty, besides costs, to be recovered on motion, five days notice of such motion being given to such purchaser. Where the purchaser fails to comply with the terms of the sale, said deposit by purchaser shall be paid over and delivered to the United States of America to be applied toward payment of said penalty, but payment of said penalty by purchaser shall not be a credit on the judgment of the United States of America against the defendant. Should the property on second sale bring less than on the former, the defaulting purchase at

first sale shall be liable to pay the United States of America all loss which it sustains, including the amount of the difference between the bid at the first sale and bid under which the property finally sold, to be recovered on motion.

(4) If no objections have been filed in writing in this cause with me as Clerk of the Court by 10:00 a.m., fifteen days inclusive from date of sale, the sale shall be confirmed immediately thereafter without the necessity of motion or further order of the court, and you, the United States Marshal, shall deliver your deed to said purchaser.

2. You, the United States Marshal shall apply the proceeds of sale first to expenses of sale, then to payment and satisfaction of said judgment as set forth herein. If the property shall sell for more than the amount sufficient to pay off and satisfy said expenses and judgment, then you

shall pay over the excess to the registry of this Clerk and notify the parties.

Please make due return of this writ certifying how you have executed same.

JAMES R. MANSPEAKER, Clerk
United States District Court
for the District of Colorado

By: _____
STEPHEN P. EHRLICH
Chief Deputy Clerk

DATE: May 20, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOLARADO, INC., et al.,

Defendants.

ORDER

CARRIGAN, J.

In previous orders entered August 22. 1984, and September 26, 1984, I granted summary judgment in favor of the plaintiff (the Government) regarding the following claims asserted by the defendants: Equal Credit Opportunity Act Claim (Fifth Claim); Misrepresentation and Concealment (Third Claim); Deprivation of Due Process (Fourth Claim); Breach of Contract (First and Sixth Claims); and Violation of Fifth Amendment (Second Claim). I

denied summary judgment on the misrepresentation and concealment claim (Third Claim) asserted against J. Martin Hime. The Tenth Circuit reversed this latter ruling on appeal, concluding that Hime was entitled to absolute immunity. United States of America v. Solarado, Inc., et al., No. 84-2329 (Slip. Op. Aug. 9, 1985).

Defendants have filed a Motion for Relief from my previous order which dismissed their Sixth Claim and Counterclaim. Defendants have also moved for partial summary judgment reasserting their argument that the guaranty agreement is unenforceable. Both of these defense motions are denied.

Finally, the defendants have moved to strike the Notice of Attorney's Lien. That motion is also denied.

It appears that all claims and affirmative defenses asserted by the

defendants have now been determined to be without merit. Plaintiff is therefore entitled to summary judgment in its favor.

Accordingly,

Summary judgment is entered in favor of the plaintiff on all remaining issues. Plaintiff is directed to submit a proposed Order for Judgment, Judgment, Order of Sale and Decree of Foreclosure within ten days after entry of this order.

Defendants' Motion for Relief from order, for Partial Summary Judgment and to Strike Notice of Attorney's Lien are denied.

Dated at Denver, Colorado, April 30, 1986.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240
(consolidated with 83-C-1485)

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOLARADO, INC., et al.

Defendants.

ORDER

This action involves two consolidated cases: United States of America v. Solarado, Inc., et al., 83-C-1240 and Ronald F. Reinisch, et al. v. Small Business Administration, et al., 83-C-1485. In United States of America v. Solarado, Inc., et al., the Small Business Administration seeks to foreclose on a house that it took as collateral to secure a loan to Solarado. Ronald F. Reinisch, the president of Solarado, and

his wife Shelley, own the house.

In Ronald F. Reinisch, et al. v. Small Business Administration, et al., the Reinischs as plaintiffs in 83-C-1485, assert six claims for relief that Solarado reasserted as counterclaims in its answer to the SBA's foreclosure action.

The SBA filed motions for summary judgment on the claims (and counterclaims). J. Martin Hime is the SBA loan officer who handled the Solarado loan and the Reinisch's guaranty agreement. He was named as defendant in the Reinischs' suit against the SBA. He has filed a separate motion for summary judgment. The issues have been fully briefed, and oral argument would not assist in determining them.

Because this case is set for trial August 27, 1984, it is necessary that the parties be apprised of my action on these motions immediately. A more complete order or opinion will follow when time permits.

It is ordered:

1. That the SBA's motion for summary judgment on Shelley Reinisch's fifth claim for relief is granted.

2. That the SBA's motion for summary judgment on the Reinisch's first, second, third, fourth and sixth claims for relief is granted.

3. That J. Martin Hime's motion for summary judgment on the Reinischs' second claim for relief is granted.

4. That J. Martin Hime's motion for summary judgment on the Reinischs' third claim for relief is denied.

5. That the trial date is vacated because this order substantially alters the issues in this case.

6. That counsel shall contact my office immediately to obtain a new date for trial of all remaining issues.

Dated at Denver, Colorado, August 22, 1984.

BY THE COURT:

_____

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FCR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOLARADO, INC., et al.,

Defendants.

ORDER

Defendants Small Business Administration and J. Martin Hime filed motions for summary judgment. On August 22, 1984, this court ruled on those motions following complete briefing of the issues. This order supplements and explains my previous rulings.

I. Background.

On August 13, 1979, Solarado, Inc. executed a promissory note payable to the SBA in consideration for a $160,000 loan.

Ronald F. Reinisch, president of Solarado, and his wife Shelley guaranteed the loan with a deed of trust to their house. Subsequently, Solarado defaulted on the loan and the United States began foreclosure proceedings on behalf of the SBA. United States of America v. Solarado, Inc., et al., 83-C-1240. In a separate suit the Reinisches sued the SBA seeking to set aside their guaranty obligation. Ronald F. Reinisch, et al. v. Small Business Administration, et al., 83-C-1485. The Reinisches asserted six claims for relief that they reasserted as counterclaims in the SBA's foreclosure proceeding. I consolidated these two cases.

The SBA filed motions for summary judgment on the claims (and counterclaims). J. Martin Hime is the SBA loan officer who handled the Solarado loan and the Reinisches' guaranty agreement. He was a de-

fendant in the Reinisches' suit against the SBA. He filed a separate motion for summary judgment.

II. The Equal Credit Opportunity Act Claim (Fifth Claim).

Shelley Reinisch contends that the SBA violated her rights under the Equal Credit Opportunity Act (ECOA) by requiring her to sign as guarantor of her husband's loan obligation. The Reinisches argue that this court should imply an ECOA cause of action for a spouse-guarantor.

The Reinisches' argument fails for three reasons. First, the plain meaning of the regulation interpreting the ECOA, 12 C.F.R. § 202.2(e), excludes guarantors from coverage. Only "aggrieved applicants" may recover under the Act, and the regulation states that guarantors are not applicants. Second, in Morse v. Mutual Federal S. & L. of Whitman, 536 F. Supp. 1271 (D. Mass.

1982), the court considered the issue here raised and held that the ECOA does not protect spouse guarantors. Third, the purpose of the ECOA is to protect married people seeking their own credit from lenders who require a spouse's guaranty, typically a husband's guaranty. The Act protects applicants rather than guarantors.

Acccordingly, I granted the motion for summary judgment on the Reinisches' fifth claim, the claim that alleged violations of the ECOA.

III. The SBA's Motion for Summary Judgment.

A. Misrepresentation and Concealment (Third Claim).

The Reinisches contend that the SBA cannot enforce the guaranty agreement because J. Martin Hime, their loan officer, misrepresented the SBA's foreclosure policy. However, the United States is not bound by acts of its agents when they exceed the

scope of their authority. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Courts have applied this principle in several cases to enforce SBA loan obligations despite claimed misrepresentations by SBA officials. United States v. R & D. One Stop Records, Inc., 661 F.2d 70 (6th Cir. 1977); Benson v. SBA, 644 F.2d 1366 (9th Cir. 1981).

Accordingly, I granted the SBA's motion for summary judgment on the Reinisches' third claim for relief, the claim based on the alleged misrepresentations and concealments of J. Martin Hime.

B. Deprivation of Due Process (Fourth Claim).

The Reinisches challenge 13 C.F.R. S 130.6, a regulation that limits the portion of loan proceeds that may be used as working capital to 25 percent of the total loan. The Reinisches argue that the ceiling is arbitrary and deprived them of substantive

due process.

The "reasonable and not arbitrary" standard of review applies to properly promulgated administrative regulations. This regulation is rational on its face. It was designed to discourage the use of loan proceeds for research and development. 13 C.F.R. § 130.6. The promotion of businesses with fully researched and developed alternative energy sources is not arbitrary. The regulation could also be a rational attempt to help insure repayment of loans by encouraging the purchase of capital assets in a highly speculative industry.

Accordingly, I granted summary judgment to the SBA on the Reinisches' fourth claim for relief, the due process claim.

C. Breach of Contract (First and Sixth Claims).

The Reinisches allege that the SBA breached the guaranty contract by failing

to comply with certain regulations and standard operating procedures. See 13 C.F.R. SS 122.21, 130.7, and 130.13. Review of these regulations reveals that they all involve either actions committed to agency discretion or actions merely permitted by the regulations.

This court cannot review agency actions committed by law to agency discretion. 5 U.S.C. S 701 (a); Panama Canal Company v. Graceline, Inc., 356 U.S. 309 (1958). The conditions for SBA loans are committed to SBA discretion. Simpkins v. Davidson, 302 F.Supp. 456 (S.D.N.Y. 1969); vonLusch v. Hoffmaster, 253 F.Supp. 633 (D.Md. 1966). In addition, "violation" of a permissive regulation is not a breach of contract because such regulations impose no requirements on the SBA. They merely provide guidelines.

Accordingly, I granted the SBA's summary judgment motion on the Reinisches' first and sixth claims for relief, the

claims alleging breach of contract.

IV. J. Martin Hime's Motion for Summary Judgment.

A. Violation of Fifth Amendment Rights (Second Claim).

The Reinisches argue that the encumbrance placed on their house by the SBA guaranty agreement deprived them of property without due process of law. Assuming arguendo that the right to keep one's possessions free of encumbrances is property, Hime did not abridge the Reinisches' procedural protections. As set forth above, the allegedly violated regulations were either discretionary or permissive. Moreover, the Reinisches exchanged the encumbrance for value -- the loan to Solarado. Therefore, they were not deprived of property without due process of law.

Accordingly, I granted the SBA's and Hime's motions for summary judgment on the second claim for relief, the claim based on

alleged violation of the Fifth Amendment.

B. Misrepresentation and Concealment (Third Claim). Hime argues that he is absolutely immune from suit. Barr v. Matteo, 360 U.S. 564 (1959). Hime outlines a three-part test for determining whether immunity is available; (1) whether the defendant was acting within the scope of his official duties, (2) whether the conduct complained of involved the exercise of judgment or discretion, and (3) whether a grant of immunity under the circumstances would further the policies underlying the official immunity doctrine. Jackson v. Kelley, 557 F.2d 735, 737 (10th Cir. 1977); Chavez v. Singer, 698 F.2d 420, 422 (10th Cir. 1983); Strothman v. Gefreh, No. 83-1108, slip op. (10th Cir. July 20, 1984).

Under this standard, immunizing a government official from suit for misrepresentations he allegedly made concerning SBA collection policies would not further the

policies underlying the immunity doctrine. As previously set forth , the SBA argues that it is not bound by Hime's misrepresentations because they were spoken outside the scope of his authority. Although tortious conduct alone is not enough to prevent application of the immunity doctrine (see Gregorie v. Giddle, 177 F.2d 579, 581 (2nd Cir. 1949) cert. denied 339 U.S. 949 (1950), the Tenth Circuit cases holding immunity inapplicable persuade me that Hime should not be granted immunity on his motion for summary judgment. Chavez v. Singer, supra; Jackson v. Kelley, supra; G.M. Leasing Corp. v. United States, 560 F.2d 1011, 1014 (10th Cir. 1965).

Accordingly, I denied Hime's motion for summary judgment on the Reinisches' third claim for relief, the claim based on misrepresentation and concealment.

My August 22, 1984 order remains in effect and is supplemented by this explana-

tion.

Dated at Denver, Colorado, September 26, 1984.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. SOLARADO, INC., RONALD F. REINISCH, et al., Defendants, RONALD F. REINISCH, SHELLEY G. REINISCH, and SOLARADO, INC., Plaintiffs-Appellees, v. SMALL BUSINESS ADMINISTRATION, et al., J. MARTIN HIME, Defendant-Appellant.	)	No. 84-2329 (D.C. Nos. 83-C-1485 and 83-C-1240 Cons.) (D.C. of Colo.)

ORDER AND JUDGMENT

Before SEYMOUR, SETH, and MCWILLIAMS, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Solarado, Inc. obtained a $160,000 loan from the Small Business Administration (SBA) pursuant to the Small Business Energy Loan Act, 15 U.S.C. S 636(1)(1982). Ronald Reinisch and his wife (Reinisch) executed a guaranty on the loan which was secured by a deed of trust on the Reinisch residence. Solarado defaulted on the loan and the SBA began foreclosure proceedings on the Reinisch home. In response, Reinisch filed an action against the SBA and J. Martin Hime, an SBA loan specialist who handled the Solarado loan application.

The Reinisch suit alleged, inter alia,

that Hime had engaged in misrepresentation and concealment in connection with Reinisch's use of his house as collateral for the loan guaranty. Hime moved for summary judgment, contending that he was absolutely immune from suit for common law torts under the rationale of Barr v. Mateo, 360 U.S. 564 (1959), and its progeny. The district court denied Hime's motion. He appeals and we reverse.

Because orders denying absolute immunity are immediately appealable, see Mitchell v. Forsyth, 53 U.S.L.W. 4798, 4802 (1985), we may review the denial of Hime's motion for summary judgment. We recently discussed official immunity for common law torts in Strothman v. Gefreh, 739 F.2d 515 (10th Cir. 1984). Strothman reiterated the three-fold inquiry developed by this circuit for determining such claims under Barr. Pursuant to this analysis the court must consider

"(1) whether the defendant was acting

> within the scope of his official duties; (2) whether the act complained of involved the exercise of judgment or discretion; and (3) whether a grant of absolute immunity under the circumstances of the case would further the policies underlying the official immunity doctrine. In making this latter determination, a court should balance the extent to which maintenance of the action would pose a threat to effective government against the harm allegedly suffered by the plaintiff for which he seeks redress."

Strothman, 739 F.2d at 518.

In applying the above analysis to this case, we begin by noting Reinisch's concession below that Hime was acting within the scope of his official duties. See rec., vol. I, at 82. We further conclude as a matter of law that Hime's conduct involved the exercise of discretion. A discretionary function is one requiring the exercise of judgment rather than the administration of a mandatory duty at the operational level. See Strothman, 739 F.2d at 519. In uncontroverted deposition testimony Hime stated that he reviewed loan applications in detail to determine whether they could

be processed for approval, and that he had authority to advance applications and accept them for formal processing. Rec., supp. vol. III, at 36-38. Evaluating the financial soundness of loan proposals clearly requires an exercise of judgment resulting in a discretionary decision to accept or reject loan applications. The same judgment applies in deciding whether to require collateral for the loan. The district court did not conclude to the contrary. Accordingly, the first two prongs of the Strothman analysis favor official immunity.

The district court resolved the third inquiry against granting immunity, concluding that immunizing Hime "from suit for misrepresentations he allegedly made concerning SBA collection policies would not further the policies underlying the immunity doctrine." Rec., supp. vol. I, at 5-6. We disagree. The SBA is required by statute to make only loans "of such sound value as

reasonably to assure repayment, recognizing that greater risk may be associated with loans made to business concerns in [the solar energy] field . . . ." 15 U.S.C. S 636(1)(7)(1982). Loan specialists must be free to evaluate applications, and to discuss proposed collateral and collection procedures, without the fear of personal liability.

Accordingly, we conclude that Hime is entitled to absolute immunity, and we reverse the district court's denial of Hime's motion for summary judgment. The case is remanded for further proceedings consistent with this order and judgment.

HOWARD K. PHILLIPS
Clerk

JULY TERM - September 17, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour and Honorable John P. Moore, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs	)	
	)	
SOLARADO, INC., et al	)	
	)	
Defendants	)	
	)	
RONALD F. REINISCH, et al,	)	No. 84-2329
	)	
Plaintiffs-Appellees,	)	
	)	
vs	)	
	)	
SMALL BUSINESS ADMINISTRATION, et al	)	
	)	
J. MARTIN HIME,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

Appendix D

95TH CONGRESS
2D SESSION

H.R. 11713

IN THE SENATE OF THE UNITED STATES

MAY 3 (legislative day, APRIL 24), 1978

AN ACT

To create a solar energy and energy conservation loan program within the Small Business Administration, and for other purposes.

(FROM PAGE 3)

"(7) All loans made under this subsection shall be of [9] such sound value as reasonably to assure repayment, recog- [10] nizing that greater risk may be associated with loans made [11] to business concerns in this field: Provided, That factors in [12] determining 'sound value' shall include, but not be limited [13] to quality of the product or service; technical qualifications [14] of the applicant or his employees; sales projec-

tions; and the [15] financial status of the business concern: Provided further, [16] That such status need not be as sound as that required for [17] loans made under subsection (a) of this section.

95TH CONGRESS
2D SESSION

H.R. 11301

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 1978

A BILL

(FROM PAGE 2)

... All loans made under this subsection shall be of sound value or so secured [22] as reasonably to assure repayment: Provided, however, That [23] factors in determining "sound values" shall include with equal [24] weight technical qualifications of the applicant or his employ[25]ees, quality of the product or service, and the financial state

(FROM PAGE 3)

[1] of the small business concern and, that any reasonable doubt [2] shall be resolved in favor of the applicant.

SMALL BUSINESS ENERGY LOAN ACT

PUBLIC LAW 95-315——JULY 4, 1978

92 STAT. 377

. . .

SEC. 3. Section 7(d) of the Small Business Act is amended by adding at the end thereof the following new subsection:

"(2) The Administration is authorized to hold seminars throughout the Nation to make potential applicants aware of the opportunities available under this subsection and related government energy programs, and to make grants to qualified organizations to provide training seminars for small business concerns regarding practical and easily implemented methods for design, manufacture, installation, and ser-

vicing of equipment and for providing services listed in paragraph (1) of this subsection, except that recipients of loans made pursuant to this subsection shall not subsequently be eligible for such grants."

RULES AND REGULATIONS

PART 130- SMALL BUSINESS ENERGY LOANS

(FROM PAGE 1371, FEDERAL REGISTER, Vol 44, No. 4— FRIDAY, JANUARY 5, 1979)

. . .

S 130.13 SBA seminars.

Under new Section 7(d)(2) of the Act, SBA is authorized to hold seminars in order to inform potential applicants for small business energy loans of the policies and procedures relating to such loans, as well as other related government energy programs. SBA, together with representatives of the Department of Energy, will develop the agendas for such seminars to meet the needs of the audiences in the various parts

of the country, and will issue appropriate public notice of such seminars.

S 130.14 Training grants.

SBA is also authorized to make grants to qualified organizations to conduct seminars for small business in order to train them in practical and easily implemented methods of design, manufacture, installation, and servicing of equipment identified in **S** 130.3. Such grants may also be used for services to recipients of grants provided for in Section 7(d)(1) of the Small Business Act. Grant recipients are limited to those organizations that have not received loans under the Small Business Energy Loan Program. (This portion of the legislation will be implemented at such time as funds are appropriated for this purpose.)

Appendix E

HOUSE OF REPRESENTATIVES Report No. 95-1071

April 19, 1978

CREATING A SOLAR AND RENEWABLE ENERGY SOURCES LOAN PROGRAM

(FROM PAGE 3)

PURPOSE OF THE BILL

The purpose of the bill is to provide additional financial assistance to certain small businesses involved in the fields of solar energy, renewable energy sources, or energy conservation. To provide such financial assistance, it establishes a new loan program authorizing the SBA to make loans to such small businesses under criteria and guidelines separate from SBA's regular business loan program; provides for training of such small businesses through grants to qualified organizations; and authorizes the SBA to provide technical manuals to such small businesses on a 50 percent cost-shared basis.

NEED FOR THE LEGISLATION

In 1953, Congress passed the Small

Business Act to preserve free competition in the economy by assisting in the establishment, preservation and strengthening of small business concerns; loans were intended to be a primary instrument of such assistance. In that act, Congress declared that the preservation of vigorous economic competition through the promotion of small business was fundamental to the economic well being and security of the nation.

Your committee has found that small buisnesses involved in the emerging but nationally vital fields of solar energy, renewable energy sources and energy conservation are undercapitalized and in need of loan assistance. Existing SBA loan programs as currently administered are of little or no help to small businesses attempting to enter or survive in such fields. Your committee recommends that a separate program, including loan and other assistance, should be established within the SBA

to encourage and preserve small businesses in such endeavors.

(FROM PAGE 5)

ADVANTAGES OF SOLAR ENERGY

Several specific economic and social advantages of solar energy (and some energy conservation measures) over traditional forms of energy have caused many to view their promotion by the federal government as in the national interest. Such incentives, if and when they occur, would tend to enhance the likelihood of profitability discussed above.

. . .

These perceived advantages include the potential for job creation, preservation of the environment, reduction of the nation's dependence on foreign energy sources, ready accessibility to all segments of the economy and an improvement in the balance of trade.

INDUSTRY CONCENTRATION

Larger companies are increasingly aware of the profit potentials of the solar energy and energy conservation fields.

Their participation has served to concentrate a larger and larger market share in the hands of a relatively small number of companies.

. . .

This dramatic increase in the entry of companies with increased production capacities into solar collector manufacturing is of great concern to the small business community and to your committee; your committee believes it should be of great concern also to the SBA.

(FROM PAGE 6)

CAPITAL SHORTAGES AND REQUIREMENTS

. . .

Your committee has found, however, through numerous small business witnesses and their trade association representatives, that these small businesses have depleted their

limited available capital, cannot proceed without additional capital and have found it virtually unavailable from private sources.

. . .

LACK OF SBA LOAN ASSISTANCE

Many small businesses unsuccessfully have sought loans involving these technologies from the Small Business Administration under SBA's regular business loan program. Your committee learned at its hearings that numerous loan applicants, in need of capital for the establishment, preservation or strengthening of solar energy or energy conservation businesses, have been turned down by the SBA, and that virtually none have been approved. (Apparently SBA determined that these applicants did not demonstrate the requisite assurances of "ability to repay" the loan, determinations that were based as much on SBA's perception of the state of the art development of

solar energy and its marketability) as they were on financial considerations.

A report issued for the Department of Energy by a private contracting firm which carefully studied the problem, found that in the area of solar energy there has been "no effective assistance by SBA." . . .

These findings were confirmed by testimony of the SBA Administrator on March 20, when he informed the Energy, Environment, Safety and Research Subcommittee that the SBA had made only three energy-related loans in the past half year.

Your committee found evidence that an important reason for this failure to make loans to such businesses results from the failure of the SBA to administer the regular business loan program criteria requiring reasonable assurances of repayment in a manner consistent with the policy of Congress to encourage and preserve competition, especially in the solar energy and energy

conservation industries.

(FROM PAGE 7)

LEGISLATIVE SOLUTION

Based on the evidence obtained at extensive hearings on these matters, your committee finds that a legislative solution to the capital needs of small solar and energy conservation businesses is both necessary and appropriate.

WHAT THE BILL WOULD DO

CREATION OF A SEPARATE LOAN PROGRAM

The bill would create a separate and new program authorizing SBA loans to small businesses involved in the fields of solar energy, renewable energy sources or energy conservation.

FINANCIAL PURPOSES

. . .

The term "start-up" refers to the process of establishing a new business, or assisting a new business in becoming fully operational, that is a business that is not

yet fully operational for the first time, or , one that has been fully operational for less than 2 years.

. . .

(FROM PAGES 8, 9)

LOAN CRITERIA

The criteria for these loans would be established separately from criteria under the regular business loan program.

Your committee is fully aware that loans made under this subsection to businesses involved in these new and emerging energy fields may be associated with somewhat higher than normal risks. Nevertheless, the committee intends by the express language of the bill to signal clearly to SBA the committee's determination that loans to small business concerns involved in these fields should be made. It is the purpose of the committee to assist small business concerns in this area through sound loans, made with as much diligence

and care as practicable to assure repayment.

The bill would direct SBA to consider four criteria in evaluating loans to these business concerns:

1. Qualifications of the business person or his/her employees; 2. Quality of the product or service; 3. Sales projections; and 4. Financial status of the business concern.

. . .

In cases where a past record of financial status exists, the SBA would be directed to evaluate it as one factor among others to be considered, keeping in mind that it is the intent of the committee that the SBA make sound loans to such small businesses involved in these energy fields with far greater frequency than it did under the regular business loan program.

(FROM PAGE 10)

CONCLUSION

. . .

Your committee concludes that solar energy has developed to a sufficient extent as to be both practically and economically feasible in some areas of the United States as an alternative to other energy sources either as a primary or secondary system. Small firms in the solar industry, either existing or potential, are severely hampered due to a lack of access to equity capital as are small firms in other industries.

Your committee believes that establishment of a separate SBA loan program for small businesses is urgently needed if such firms are to participate in the solar energy and energy conservation fields. The committee recognizes that initially there may be a greater risk of loss in making this type of loan but it believes that a somewhat higher risk is justified when coupled with the restrictions and safeguards provided in the bill.

SENATE Report No. 95-828

May 15, 1978

SMALL BUSINESS ENERGY LOAN ACT

(FROM PAGES 4, 5)

NEED FOR LEGISLATION

1. The Long-Term Energy Crisis

In 1977, the United States imported 8.6 million barrels of oil per day, at a cost of approximately $45 billion for the year. If present trends continue, the Nation's total imports will be 16.5 million barrels of oil per day by 1985. At an estimated price of $18 per barrel in 1985, the drain on our trade balance due to these oil imports will have risen to $108 billion annually. President Carter has proposed an energy program which the Congressional Office of Technology Assessment has estimated will hold oil imports to a level of perhaps 10 million barrels of oil per day by 1985. This would result in an annual bill of some $68 billion for imported oil.

Equally disturbing as the drain on our

economy is the growing danger of severe economic upheaval. A growing threat to our national security is posed by this increasing dependence on foreign oil. The "oil weapon" was used effectively by oil-exporting nations as an instrument of their foreign policies; its potency as a weapon has grown since then.

The President's national energy plan is a sweeping set of actions on many energy fronts. However, as Senator McIntyre noted in his opening statement at the April 3, 1978, hearing—

> It is not clear that the President's proposals will all work as effectively as we hope they can. Even if they do, with an anticipated drain of $65 billion to $108 billion per year for imported oil, there is clearly room for additional measures to reduce the threat to our economy and to our national security posed by foreign oil.

But there is some question of how companies involved in producing alternative, domestic forms of energy, and those pro-

ducing energy conservation measures, will obtain capital necessasry to effectively operate their businesses.

(FROM PAGE 6)

4. Capital shortages

Industry, public witnesses, and Administration witnesses testified during the hearings with ample documentation that capital simply is not available today to small businesses involved in energy conservation products or renewable energy measures, except to those who are willing to turn over substantial control of their businesses to large corporations. In the solar photovoltaic cell industry, four of the 10 most significant competitors are owned or partially owned by four major oil companies—Exxon, Shell, Mobil, and Arco. Exxon, in addition, owns one of the Northeast's more prominent solar collector production companies, Daystar Corp. The growing trend toward concentration of alternative energy

companies into the hands of major oil companies is the direct result of oil companies making sound longterm investments while Government fiscal policies strangle independent competitors.

(FROM PAGE 8)

5. SBA Loans Are Not Available

In his May 25, 1977, appearance before the committee, Administrator Weaver testified that he believed the existing 7(a) program, without modifications, meets the purposes of the proposed legislation.

When asked how many loans the SBA had made as of that date for solar energy and energy conservation, Administrator Weaver submitted for the record the response that the SBA had not kept such data.

He noted however, that under the 7(a) legislation, an applicant must demonstrate to SBA the ability to repay the loan. A number of small business witnesses testified that they had been turned down or discour-

aged from applying on the basis that they could not demonstrate the ability to repay. In the view of some witnesses, the determination that they might be unable to repay was based largely upon SBA's view of the state of solar technology and the lack of market history for the solar energy industry. Their testimony was confirmed by a report to the Department of Energy by a private consultant, who concluded that there has been "no effective assistance from SBA" to small solar energy firms.

(FROM PAGE 9)

6. Administrative Remedies

. . .

Further, applicants find themselves deterred more by SBA loan officers' beliefs that renewable energy measures are not currently marketable than by any failure to understand technology. One witness, Peter Boe, described the solar energy industry as—

> ... a vast uncharted land— There are no industry averages, no projected earnings ratios, no fine standards and no easy formulas. Small businesses entering the solar industry are faced with developing lines of credit, a product line, and a market in an industry which has a potentially great future but virtually no past.

A loan officer, in this business climate, must consider the requirement of subparagraph 7(a)(7) when reviewing a loan:

"All loans made under this subsection must be of such sound value or so secured as reasonably to assure repayment."

Having no alternative guidelines on how to judge the marketability of the product, and with no instructions to consider such issues as the likely value of an energy conservation or renewable energy product to the economy, the prudent loan officer using traditional lending criteria has little choice but to turn down the applicant.

For this reason, the administrative remedy attempted by the SBA with the cooperation of the Department of Energy has

been, and is likely to continue to be a failure.

(FROM PAGES 9, 10)

THE PROPOSED LEGISLATIVE SOLUTION

Based upon the extensive evidence gathered at these hearings, the committee finds that small businesses involved in renewable energy and energy conservation are likely to contribute substantially to solving the Nation's energy problems.

The Federal Government is spending hundreds of millions of dollars per year on research and development of renewable energy and energy conservation technologies. The committee perceives that a gap exists in existing national energy programs, however. Small firms which are developing these measures do not have access to the capital needed to bring their products to market. It is the intent of the committee that loans under this program shall be applied to meeting the urgent national

social and economic objective of displacing foreign supplies of fuel with domestic energy conservation and renewable energy measures. In this regard, it is expected and intended that the SBA will take greater risk in the program created under the bill than is normally associated with business loans under the 7(a) program.

. . .

Appendix F

HOUSE OF REPRESENTATIVES Report No. 96-1451
October 2, 1980

ROLE OF GOVERNMENT FUNDING AND ITS IMPACT ON SMALL BUSINESS IN THE SOLAR ENERGY INDUSTRY

(FROM PAGE 2)

. . .

This study focuses on ways in which the Federal solar effort can be redirected to assist small businesses. It examines current Federal programs, research and development spending, marketing plans, industry makeup, and consumer barriers to the use of solar devices. It focuses on small solar companies which are attempting to secure a place in these new industries, in spite of tight capital conditions and low consumer confidence.

(FROM PAGES 52- 57)

CHAPTER VIII. SELECTED FEDERAL PROGRAMS TO HELP SMALL BUSINESS IN THE DEVELOPMENT OF SOLAR ENERGY

A. SBA ENERGY LOAN PROGRAM (P.L. 95-315)

As the only Federal program which provides funds for new, or existing, business-

es in solar energy, the SBA Energy Loan Program serves as a critical source of capital for solar small business. Other Federal programs seek to increase solar energy demand. As demand increases, manufacturers must increase production. Obtaining capital to increase production is a major problem because financial institutions consider solar a high risk. Through the SBA Energy Loan Program, solar small businesses can obtain lending to help meet these capital needs. This assistance provides support to an industry which has the potential to meet 20 percent of the Nation's energy needs by the year 2000.

During the 95th Congress, hearings held by the Small Business Energy, Environment, Safety and Research Subcommittee found that solar small businesses were undercapitalized. With financial institutions unwilling to make loans for solar projects, the Subcommittee determined that "[solar] small

businesses have depleted their limited capital, cannot proceed without additional capital and have found it virtually unavailable from private sources." The existing SBA loan programs were of little help, because solar small businesses could not qualify for loans. Solar energy was considered an unproven high risk venture; the market was limited and replacement costs were not competitive.

Any new business carries a certain amount of risk; however, the solar small businesses' capital formation problems needed to be addressed as an element of the move toward alternate energy sources. Small businesses not only have difficulty obtaining loans from conventional sources, but they also encountered difficulty in seeking loans from the agency set up to help them— the Small Business Administration.

As a result, Congress passed P.L.

95-315, The Small Business Energy Loan Act. This Act established a separate loan program within SBA. By recognizing the greater financial risk in solar energy development, the act directed SBA to ease lending requirements.

Designated as 7(ℓ), the program went into effect in January 1979. P.L. 95-315 stipulates that loan money may be used for "financing plant construction, conversion, expansion or start up, and the acquisition of equipment, facilities, machinery, supplies, or materials to enable such concern to design architecturally or engineer, manufacture, distribute, market, install, or service" certain energy measures.

These measures include solar equipment, photovoltaic cells, conservation devices, wind energy and hydroelectric equipment, and other designated equipment.

Only 30 percent of the funds from a 7(ℓ) loan may be used for research and de-

velopment. One hundred percent of the loan may be used for working capital.

In FY 79, 141 7(ℓ) loans were approved, totalling approximately $19 million. Of this number, 106 were direct loans (including immediate Participation Loans), totalling $14.5 million, and the remaining 35 loans were guaranteed, for a total of $4.5 million. Guaranteed loans are made by a lending institution, and SBA guarantees 90 percent. Direct loans are made by SBA at a below market interest rate. To qualify for a direct loan, a business must have been turned down by at least two lending institutions.

The smallest 7(ℓ) loan in FY '79 was $10,000; the largest $500,000 (the maximum for a direct loan). The average loan is $115,000; however, 80 percent of the loans were between $50,000 and $200,000.

Although the loan limits may be adequate in meeting the SHAC industry needs, they

are too low for photovoltaic companies. As established in Chapter VI, the entry costs for photovoltaic companies are high. The photovoltaic industry needs increased loan limits so that the Energy Loan Program can truly address their capital needs.

Through January 31, of FY 80, 70 energy loans have been approved under this program.

(1) Problems with the program. From the outset, problems plagued the program, which is not achieving its Congressional mandate. The major problems are as follows:

(a) Inadequate funding. P.L. 95-315 authorizes $45 million in guaranteed lending and $30 million in direct lending for 7(ℓ) loans. However, in FY '79, appropriations totalled only $1 million for guaranteed and $5 million for direct loans. In FY'80, appropriations increased to $30 million for guaranteed loans and $15 million for direct loans; the amounts did not approach the loan demand.

The funds for the 7(ℓ) loans are evenly dispersed to SBA on a quarterly basis. For example, if the total FY amount for direct loans is $1 million, $250,000 is dispersed each quarter. Because the budget for 7(ℓ) is inadequate for demand, SBA headquarters controls approval and flow of loan payments. This occurs even though the SBA district and regional offices approve the loan application. Thus, an applicant's loan may have been approved, but the loan money may be delayed. For example, after the second quarter disbursement of loan funds, the backlog was so large that some applicants waited two additional quarters to receive funds even though their loan application had been approved months before.

For FY '81, SBA requested zero funding for the 7(ℓ) program because of its loan consolidation plan. In a memorandum from Ms. Evelyn Cherry then-Chief, SBA Special Projects Division, to Mr. Arthur Armstrong

SBA Director of the Office of Financing, Ms. Cherry noted that "[t]he only change needed in the energy program is more direct funds." In addition, a letter from SBA Administrator Vernon Weaver to the Honorable Berkley Bedell states that SBA requested from the Office of Management and Budget $50 million in direct loans for the energy funds.

The discrepancy between SBA recommending more direct funds, yet submitting to Congress a budget proposal seeking no such funds, demonstrates the lack of commitment by the administrator of the program. It explains many of the attitudinal problems with the program administration.

To adequately address the financial needs of solar small businesses, program funding should be increased beyond previously authorized levels. These loans would enable small business and the solar industry to remain competitive, consumers to

have a choice in equipment, and solar energy usage to increase.

(b) SBA Lending Officers Lack Techni-Knowledge. Testifying before the Subcommittee, the SBA Deputy Associate Administrator for Finance and Investment, Mr. Peter F. McNeish, stated:

> [O]ur loan officers do not have the capability to understand the complexities of these technologies and it has been difficult for them to make those kinds of assessments compared to their regular loan activities on the commercial lending side of our operation.

Originally, DOE was to work with SBA in providing an evaluation of loan proposals. Instead, a lack of communication over each agency's role in this partnership developed. SBA loan officers were unable to obtain from DOE the technical information essential to loan evaluation. Lack of cooperation hurts the program and causes unncessary delays in loan approval.

Rejecting or approving the loan on the basis of inadequate technical evaluation

or understanding is far from fair to the solar small business. If the loan officer approves the loan without obtaining the necessary technical information, he may impose unnecessary financial risk on the government. If the loan officer seeks the technical information elsewhere, the time lag increases. Few solar small businesses have the capital reserves to sustain themselves for a long period.

During 1980, SBA and DOE have attempted to resolve the stalemate. SBA field officers are assigned a specific DOE representative who is to provide assistance in the evaluation of loan proposals. In the future, the Federal Regional Solar Energy Centers (RSEC) should become more involved. This would expedite the loan procedures, because some of the needed information is regional in nature, and should be available immediately.

Although progress is being made, the

problem was unresolved for too long, and application and evaluation time delays were excessive. There are no guarantees that the current efforts by the two departments will be a success.

(c) SBA Regional and District Offices Fail to Promote the 7(ℓ) Program. Lack of familiarity and promotion of the 7(ℓ) program, both SBA personnel and solar small businesses, limits the effectiveness of the program. It is argued that as loan demand outstrips loan supply, no further outreach is needed. The Subcommittee strongly disagrees with this philosophy: The government should actively promote its programs to outside groups as well as to its own employees, regardless of funding levels.

In a quick survey of SBA district offices, Solar Lobby found that "the knowledge of this program was uneven indeed. Several field officers professed no knowledge of the Small Business Energy Loan

Program whatsoever."

P.L. 95-315 authorized SBA to "hold seminars throughout the nation to make potential applicants aware of the opportunities available under this subsection and related government energy programs and to make grants to qualified organizations to provide training seminars for small business concerns regarding practical and easily implemented methods for design, manufacture, and installation."

The Subcommittee found that no seminars have been held, nor have any training seminar grants been made. SBA is not using its in-house capabilities to promote the program, nor is it using outside talents. The Subcommittee is concerned that SBA appears not to be following its legislative mandate.

(d) Unnecessary Paperwork. In enacting the SBA Energy Loan Program, Congress intended, as stated in the law, that "the paperwork burden and regulatory impact on ap-

plicants...shall be minimized." The Subcommittee found that SBA has made no efforts to implement this section.

Mr. Joseph D. Womack, President of the Solactor Corporation, a solar small business recipient of a 7(ℓ) loan, testified about this. Previously a systems and procedures analyst in the Federal government, Mr. Womack said: "I have counted, in my approximately 4-pound application file, about 52 different forms, exhibits, financial statements, and the like requiring no fewer than 1,127 segments of data. Added to this were approximately 5,000 words of narrative description, as well as thousands of calculations and hundreds of hours of preparation time." Mr. Womack further stated that "expensive professional assistance should not be necessary to forms preparation."

Excessive paperwork drains time, resources, and energy from any business. According to Mr. Don A. Olson, President

of Trendsetter Industries, "All of them [solar small businesses] said they hesitated to ask for capital through the Federal or State Government system, because they just couldn't handle the redtape; it was just more hassle than it was worth...." SBA must work to carry through the provisions of P.L. 95-315, which are specifically designed to minimize paperwork and to clarify regulations.

2. SBA's Plan To Consolidate the Program. With the Energy Loan Program in existance for only a year, SBA proposed to consolidate the 7(ℓ) program into a general business loan program. The agency's rationale was as follows: Too many loan programs were in existence and confused applicants; the direct loan funds could be better utilized by targeting selected groups (women, handicapped, and disadvantaged) for all direct loans.

Recognizing the higher financial risks

for solar small businesses, the current 7(ℓ) program contains less stringent lending requirements than those of other SBA loan programs. Program regulations state "such status [of the business concern] need not be as sound as that required for loans under Section 7(A) of the Small Business Act." These less stringent lending requirements would be eliminated if 7(ℓ) is consolidated; solar small businesses would have to qualify for loans under more rigid regular business loan requirements.

In effect, the intent of Congress to establish a SBA loan program with less stringent lending requirements for energy businesses would be subverted.

Even if a small business could qualify under the stricter lending requirements, direct loans would be virtually unavailable because these funds would be targeted only to women, handicapped, and disadvantaged. Few, if any, solar small businesses quali-

fy under these categories. Over 75 percent of 7(ℓ) loans are direct loans and only 25 percent could participate in guaranteed lending under the less stringent lending requirements. The unavailability of direct loans, coupled with more stringent lending requirements, would virtually eliminate access by solar small businesses to SBA loans.

In its statement of philosophy to target all direct funds to women, handicapped, and disadvantaged small businesses, SBA states the following: "[D]irect funds should be used only in situations where access to capital is impaired or where the risk factors are too high for the private sector." This statement speaks directly to the needs of the solar small business; yet, many would not qualify for SBA loans under these proposed changes.

To address the capital needs of solar small business, the Energy Loan Program

must not be consolidated; rather, it must remain a separate lending program with its less stringent lending requirements in place. Solar small businesses need this program; consolidation would subvert the original intent of the legislation.

The SBA Energy Loan Program serves a crucial need to many small businesses involved in helping the Nation solve its energy crisis. The tremendous loan demand created by this nonpromoted program highlights the capital formation problems encountered by solar small businesses. The 7(ℓ) program alone is not the solution. The demand is great, and the need may never be met. However, as the only current program in effect which addresses this issue, its importance cannot be understated. The program merits promotion, commitment, and funds to help meet solar small business needs.

HEARINGS
December 11 and 12, 1979
before the
SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

THE STRUCTURE OF THE SOLAR ENERGY INDUSTRY

From "Summary of a Report by Derek Hansen and Associates", page 279.

. . .

On another level, government intervention in the capital markets can be designed to stimulate more socially and economically beneficial movement of capital. This is a possibility when the need is not market competititve, but has social implications that add value to the capital investment that will not be shown as profit. This sort of intervention should structure its incentive or restriction to give the greatest degree of impact per dollar spent. For solar energy-related business financing, for example, the basic question should be, "What is the cost per barrel of oil saved?"

VI. Traditional vs. Potential Government Role

An important ethical question will occur over most potential government programs to assist small business financing. If the government encourages a potential or existing entrepreneur to take more risk than the banking system would support, and the business fails, should the government push the entrepreneur into bankruptcy? Or (unless there are special circumstance of fraud, for example), should the government recognize the failure and the loss to the entrepreneur as sufficient downside risk without requiring full restitution of the loan up to the maximum ability to pay? In effect, if there is social value to encouraging entrepreneurship because it creates jobs, new products, competition, and in some cases, special benefits such as energy savings or production, should the government share in the risk rather than leverage all of the risk against the potential entrepreneur?

Appendix G

HEARING

MARCH 20, 1978

before the
SUBCOMMITTEE ON ENERGY, ENVIRONMENT,
SAFETY AND RESEARCH
of the
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

H.R. 3981 AND H.R. 3984, THE SMALL BUSINESS ENERGY CONSERVATION AND COMMERCIALIZATION AMENDMENTS (PART 7)

(FROM PAGES 4, 5)

Mr. Weaver (Administrataor of the Small Business Administration): . . .

We appreciate and support the intent of this legislation. However, we must oppose the bill on the following grounds.

One, the bill is not substantially different, in effect, from our present 7(a) program.

It provides for a loan program which still requires a finding of sound value, or sufficient security to assure repayment. This new subsection under section 7 of the Small Business Act would not enable us to do anything we presently cannot do under

section 7(a). We currently have the authority under 7(a) to accomplish the objectives of the bill.

Two, the legislation would add yet another special loan program— a move which is in complete opposition to our attempts to streamline and consolidate our already numerous and varied loan programs.

Three, the bill would, in fact, impose a more restrictive ceiling— $350,000— on SBA's share of a loan. Currently, under 7(a) authority we can loan up to $500,000.

Four, the proposed 100-percent guaranty goes against all SBA lending policy and philosophy because it would take all the participant lenders' risk out of the loan. This would leave little incentive for the participating lender to give the loan the necessary attention it needs in order to protect public funds from misuse.

Five, the bill attempts to legislate credit requirements which involve extremely

subjective factors and would be very difficult to implement.

The language reads, "factors in determining sound values shall include with equal weight technical qualifications of the applicant or his employees, quality of the product or service, and the financial state of the small business concern."

The technical qualifications of the applicant or his or her employees, and the quality of the product or service, are simply beyond the capabilities of our loan officers to reasonably assess.

In any case, we presently have an agreement with the Energy Research and Development Administration, now part of the Department of Energy, which provides for the technical evaluation of energy inventions by the National Bureau of Standards.

Six, since the legislation contemplates addressing a capital need within an industry where the majority of the companies

are in a startup position, the bill should contain a sunset provision so that we will not be left with a program after the perceived need has expired.

Seven, if it is the congressional intent to create liberal credit criteria for solar energy and energy conservation loans, the language in the bill should be stronger and more direct and to the point.

It is not very clear from the legislation that the loans are to be soft loans with soft collateral requirements. In addition, there is no indication that the loss rates are expected to be higher.

The stronger language in the bill should also be backed up in the legislative history by a clear statement of congressional intent.

In summary, the Small Business Administration is eager to assist small energy-oriented businesses. We do not believe, however, that enactment of the legislation

would bring about any substantial changes.

It appears to us that there is little to be gained by creating a special loan program to accomplish that which we already have the authority to do under section 7(a) of the Small Business Act.

. . .

(FROM PAGE 25)

Mr. Baldus. In your testimony you also spoke about the intent to making softer loans.

Mr. Weaver. Yes, sir.

Mr. Baldus. If this were to be enacted, would you prefer to have a section that specifies that the purpose is to assume risk?

Mr. Weaver. If that is the intent of Congress, we would like it better spelled out. As a matter of fact, we can ignore to some extent the requirement we now have, and that is the ability to repay the loan.

(FROM PAGE 26)

Mr. Baldus. I do not know just how you operate, but one of the things we found repeatedly is this. A person might have a reasonably good track record as a businessman, as an entrepreneur, but if he starts off on a solar track then he does not have any track record of profitability. That seems to be the dead end that he runs into. We hear that rather repeatedly in various places. Is that a problem that you can see that may be occurring in the field?

Mr. Weaver. If it is a startup situation with not sufficient collateral to guarantee repayment, then the repayment would have to come from cash flow. If we could not see it, then we would not make the loan. That is correct.

(FROM PAGES 37, 38)

Mr. Bergman (Vice president of the Solar Energy Industries Association):

Mr. Chairman, an overriding concern we have begins with the wording on page 2 line

20, "All loans made," and ends on page 3 line 2.

In particular, starting with line 20, "All loans made under this subsection shall be of sound value or so secured as reasonably to assure repayment," we understand the necessity for sound financial management. However, the inclusion of this requirement, as stated, assumes that small businesses could obtain capital from existing financial institutions.

A previous SBA witness before this subcommittee implied there are sufficient ongoing Government programs to provide financial assistance to develop the solar industry.

As an example, one program mentioned was SBIC. However, the number of SBIC's is insignificantly small and most often inaccessible. There are, on the average less than six SBIC's per State. The SBIC's often specialize in one industry and have shown

very little interest in assisting the solar industry.

We must recognize that some solar loans will involve risk, and this is a risk we must take. It is better to risk a few dollars now on possible loan defaults than to risk paying billions of dollars for a short-term supply of imported fuel.

Therefore, we recommend modification of this line.

Second, we recommend the deletion of the reference to "equal weight" and rewording of the factors in determining "sound value." Specifically the technical qualifications of the applicant should be amended since the interpretation of a technically qualified applicant in this new field would be arbitrary.

. . .

We recognize that the financial state of a small business concern will not be as strong as the financial state of similar

businesses which are already established.

. . .

In short, we recommend the following revisions on page 2 line 20, "All loans made," and ending on page 3 line 2, to read something close to this:

> All loans made under this subsection shall be of sound value as reasonably to assure repayment, recognizing that a greater amount of risk shall be involved in new ventures in this field at this time. Provided, however, that factors in determining "sound value" shall include consideration of the quality of the product or service as evaluated by a representative panel; technical qualifications of the applicant or his employees, but not precluding persons without formal academic credentials; the financial state of the small business concern, taking into consideration that its financial structure will not be as strong as already established similar businesses; consideration of the product's marketability (sales projections) and, that any reasonable doubt shall be resolved in favor of the applicant.

We support the intent of H.R. 11301 and hope you will implement our suggestions that SBA make direct loans, increase the amount and time of the loan, modify the

qualifications for obtaining a loan, and amend the definition of solar energy and energy conservation equipment.

HEARING

APRIL 3, 1978

before the
SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

THE ENERGY RESEARCH INCENTIVES ACT AND THE SMALL BUSINESS ENERGY LOAN ACT

(FROM PAGE 3)

Mr. Weaver. . .

While we understand and support the objectives of the proposed bill, we oppose the legislation as drafted on the following grounds:

First. The proposed bill gives SBA no loan authority beyond that which the Agency currently has under section 7(a) of the Small Business Act.

The provision contained in section 7(a) which states that "all loans made under this

subsection shall be of such sound value or so secured as reasonably to assure repayment" would still apply to "energy independence loans."

Second. Although the proposed bill provides that an energy independence loan be considered secured for the purposes of 7(a) if certain conditions are met, these conditions relate only to the technical merit of a product or service, not commercial feasibility.

Establishing technical merit does not resolve the question of market feasibility, which of course is the key to repayment ability.

HEARINGS
MAY 25 AND 26, 1977
before the
SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

SMALL BUSINESS ENERGY RESEARCH
INCENTIVES ACT

(FROM PAGE 57)

Senator McIntyre. . . .

Basically your statement seems to show that SBA supports the intent of this legislation, but does not support the legislation itself.

Mr. Weaver. Only because we feel we have adequate law in SBIC and SBA.

(FROM PAGES 61, 62)

Mr. Weaver. . .

Our opposition is based on our belief that we can handle the problem with existing law.

Senator McIntyre. Your 7(a) program is broad, but the solar energy companies that we talked to say its criteria for a loan are much too tight.

Does the 7(a) program allow for loans to new companies and industry?

Mr. Weaver. Yes; providing that we see the ability to repay the loan.

If we do not see this, we on many occasions refer them to SBIC in the hope they will obtain venture capital, which most of them need.

Senator McIntyre. . . .

Does this 7(a) program allow for a loan to a company that has put all of its assets into developing a good product, but has no capital left to manufacture or sell on the market?

Mr. Weaver. I hate to say it again, but we have to have the ability to repay the loan, there must be cash flow, there must be ongoing sales.

HEARING

SEPTEMBER 14, 1977

before the

SUBCOMMITTEE ON ENERGY, ENVIRONMENT, SAFETY AND RESEARCH

of the

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

H.R. 3981 AND H.R. 3984, THE SMALL BUSINESS ENERGY CONSERVATION AND COMMERCIALIZATION AMENDMENTS (PART 2)

(FROM PAGE 21)

Mr. Weaver. . . .

The Small Business Administration is not opposed, in principle, to the goals of H.R. 3981 and H.R. 3984. However, it seems to me that the intent of these bills can be carried out under our existing programs, the passage of the National Energy Act, and increasing cooperation between SBA and the energy agencies, a coooperation which has already been initiated.

Accordingly, SBA opposes enactment of H.R. 3981 and H.R. 3984.

(FROM PAGE 31)

Mr. Bedell. Sure, but in that situation how would you see it working? Supposing I am an individual who has developed a new collector for solar energy, and I want to start to produce that item, and I come to you for a loan on that item. How would you see that as working?

Mr. Weaver. If you had no ability to repay the loan, in our opinion, then we couldn't make you the loan at that time. I would then refer you to ERDA for their evaluation, and then, presuming their evaluation is positive, then I would see us bringing in our SBIC's for venture capital, and then us making a loan for the working capital.

Mr. Bedell. Apparently you feel you would not be qualified within your organization to decide whether or not you felt that had potential, and whether——

Mr. Weaver. As an invention, no, sir. As a technical innovative invention, I don't think we have that technology.

Appendix H

A REPORT
TO THE SMALL BUSINESS ADMINISTRATION

Under Contract No.: SBA 7 (J)-MSB-80-51

(FROM PAGE 1)

. . .

CONCLUSIONS:

Solarado is at a competitive disadvantage with the local solar energy industry. Most of these companies have large cash reserves that are used to acquire a professional sales staff and for implementing extensive marketing and advertising campaigns. Because of Solarado's limited financial posture, it is compelled to use less sophisticated marketing techniques as well as having to do the marketing by the company's owners.

Despite this handicap, Solarado can capture a limited share of the market by concentrating its efforts on certain identifiable market segments that have been overlooked by the competition. These markets are the

car wash industry and the industrial laundry market. These two markets offer the greatest opportunity for sales and have the greatest need for solar energy applications.

(FROM PAGES 5, 6)

. . .

It should be pointed out that Solarado is at a marketing and financial disadvantage with its major competitors in the state of Colorado. For example, there are approximately ten manufacturers of solar collectors in the Denver area that have made public offerings of their stock to generate adequate working capital. Solaron Corporation is an excellent example. For the year ending December 1979, the company had cash reserves of $874,000, despite a net loss of $749,000 on gross sales of $2,002,000. During that same year, Solaron expended in excess of $1,000,000 in selling expense. Solaron's experience is indicative of all the publicly owned solar manufacturers in

the State of Colorado. Because these companies have from 1 million to 3 million in cash to work with, they can spend tremendous amounts of money for advertising the company image and product. Further, they can afford to bid jobs at a loss, undercutting their competition, because they know they have sufficient cash reserves to carry the company during economically distressful times and until the public is ready to fully accept the concept of solar energy. They can also give the public reduced prices or special discounts on the installation of solar devices just to develop a track record.

Solarado on the other hand cannot, because of financial limitations, advertise in the quantity and quality that is truly necessary to develop the level of sales that will cover its cost of operations. Solarado cannot bid projects at cost or at a loss for fear of generating a negative cash-

flow. At a time when demand for solar energy is just beginning to emerge and competition for the little demand that does exist is great, Solarado has no equitable chance to win. This statement is supported by the fact that Solarado recently lost a substantial contract with a local residential developer because of the price it submitted. In fact, it was not within the top three competitors despite submitting a bid that was cut to the bare minimum.

Given the disadvantages Solarado has within the solar industry the company must identify those market segments that have not been approached by the competition. There still is a risk because the typical potential purchases of solar systems shops around before making a commitment.

Solarado identifies that market and generates some interested clients. These clients in turn call the competition to get alternate bids. The competition then quotes a

price substantially lower than that quoted by Solarado. Although Solarado effectively marketed its product, it lost the sale because it could not absorb the losses that the competition can and does. (Several solar manufacturer's financial statements are enclosed as Exhibit A to this report for information purposes solely).

. . .

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-1240

UNITED STATES OF AMERICA,

Plaintiff.

vs.

SOLARADO, INC., RONALD F. REINISCH, SHELLEY G. REINISCH, et al.

Defendants.

AFFIDAVIT OF RONALD F. REINISCH

COME NOW, Ronald F. Reinisch, who being duly sworn and deposed, states as follows, based on personal knowledge and belief:

1. That there was no "meeting of the minds" in 1979 during the Solarado, Inc. loan transaction because of all the inconsistent and confusing circumstances under which my signature and that of my spouse's were obtained and utilized by SBA.

2. I was influenced and encour-

aged by Government officials who promoted the Small Business Energy Loan Program. I spoke directly with aides to Senator Hart about the Senator's sponsorship of a Bill to solarize military barracks; with Joe Louis Barrow at the Deptartment of Energy about the status of the energy program with regard to funding; to Tony Robinson, SBA Advocacy Office, about the imminence of energy program funding; to Roger Johnson, who indicated that the loan qualification would be based on technical factors and suitable background of the proponent. I was led to believe that my background with NASA (National Aeronautics and Space Administration) and SERI (Solar Energy Research Institute) were favorable and pertinent factors for an energy loan. I was also aware of President Carter's strong support of alternative energy development.

3. When I first went to SBA I noticed that the personnel were uninformed

and unenthusiastic about the Energy Loan Program. I knew then, as I do now, that Congress and the President, not the SBA has the power to decide what is in the best interests of the Nation. It did not occur to me then, that SBA would not follow Congress' orders or perform its duties.

4. I did not know I had applied for or incurred any personal liability for two reasons. First, the corporation, of which I was president and 100% stockholder, was the applicant and I knew that as an officer or stockholder I was protected from being held personally liable for a corporate debt. My reason for incorporating Solarado was to avoid jeopardizing my family's personal assets. Secondly, the SBA did not discuss or mention the personal guaranty with me at all. I did not know about it until @ August, 1979 when it appeared as #10 on a list (EXHIBIT Z) of 14 papers I was told to bring home and sign and get my

wife's signature, too. I was told by Don Furtivo, the first SBA loan officer assigned to the Solarado application, that a lien would be required on my house (and business assets) (EXHIBIT Y), but that SBA does not take away houses. (EXHIBIT X). However, I did not know that I would have to sign a deed of trust until the time came to sign the paper, and when it was referred to in item # d. on the list. At that time I did not understand the difference between a Warranty Deed and a Deed of Trust.

5. Despite SBA's disconcerting conduct, I believed I was in harmony with Congress' and the President's legislative actions and pronouncements, so I tended to trust the SBA. It never occurred to me that SBA was disguising its real intentions, or that SBA was breaking the law.

6. There was no discernible contractual transaction. The application period ran from February, 1979 to July 1979.

SBA directed all of my attention to the business plan, and its modification according to two loan officers' conflicting instructions.

7. The matter of personal liability for the corporate debt was never discussed as such. In response to the requirement of a lien on my house, I inquired about the possibility of losing my house if the business failed, and was misrepresented to. (EXHIBIT W) The loan application (EXHIBIT V), reverse side, question #7 asked, "Do you have any co-signers and/or guarantors for this loan?" I answered on behalf of Solarado, Inc., "No." I believed that Solarado's intention not to provide guarantors was expressed and would be honored by my answer on its behalf. I do not understand how this expressed intention in writing not to have the loan guaranteed was disregarded and then transformed somehow by the SBA into an unconditional personal guaranty by me

and my wife. My wife never even went to the SBA offices during loanmaking or for the actual signing of the loan documents.

8. There were no indications by word or deed that the SBA would require or rely on our personal finances or assets for repayment of $160,000 of corporate indebtedness. First of all, logically, $160,000 is a huge debt for the ordinary person to incur. No customary credit inquiries were made to determine my ability to shoulder such a debt, as by a signed credit release to check if the Reinisches were financially qualified to service $160,000 in debt on a yearly salary of @ $40,000. I always tried to live within my means. I avoided large indebtedness, except for a first mortgage of $50,000, which was only one third of Solarado's debt, and the most I could personally handle. I maintained a good credit rating. it was inconceivable that I was being trapped into assuming the liability

for the payment of such a large sum of money that in reality I would be unable to service.

9. If SBA had been forthcoming about the personal liability they imposed on me, I would have gone directly to Congress to verify if the intent of the energy loan program was to get people's homes on the line to insure the repayment. I would ask Congress whether the energy loan required more than the proponent's contribution of an equity investment in a qualified energy product. The loan officers' representations precluded further investigation.

10. Notification that the loan was approved came on July 26, 1979 by telephone. I was not in any particular hurry since Solarado was a startup business from scratch, rather than a going concern. I received telephone calls from the SBA the following week informing me that if I didn't sign the papers soon I would lose the money.

Since Government funding was the only means for me to market my innovative product, I was coerced into signing sooner than I needed to.

11. There was no supervised closing. I didn't know what SBA really had in mind, but I do believe that SBA knew I wanted to avoid personal liability for three expressed reasons: (a) Solarado was incorporated to shield me and my family from personal liability; (b) On the application I let it be known that Solarado would not provide guarantors; and (c) I had inquired of two loan officers about the risk of losing my house if the business failed and was assured that my house was not in jeopardy.

12. The unsupervised closing presented me and my wife with 14 papers that were entirely new and strange, and for which I was totally unprepared. The SBA had not explained these things to me and treated

them like inconsequential and token matters that I had no need to understand or pay attention to. Since during the previous six months of applying for the loan SBA dwelt wholly on the business plan, I assumed that the matter of importance to SBA was the potential business earnings of Solarado, and not my personal financial status or assets.

13. On or about August 13, 1979, I was told by the SBA typist-clerk to come down to the SBA office to pick up the papers to sign. I was given a listing of 14 items with the papers and told to take them home to sign and to get my wife's signatures. The items were not listed in any particular order of importance or grouping. For example, the guaranty is #10 while the Authorization and Loan Agreement, SBA Form 349A is #1. The SBA has tried to enforce the guaranty in this litigation, but did not even attach the Authorization and Loan Agreement

(EXHIBIT U) to its Complaint.

14. My wife and I signed the documents at that time because of the fear of delaying and losing the money. It did not occur to us that we needed to get a second opinion to avoid fraud on us becasue we beleived SBA was part of our Government and I was not then and still am not now of the opionion that the Congress intended to sacrifice my residence by entrapment, or by other devious means, even to serve great public purpose.

15. The SBA breached conditions it set and listed in the Authorization and Loan Agreement. (EXHIBIT U) The first violation that came to my attention was that Solarado was not given the amount of money in its first disbursement that was stated in the Business Plan Monthly Cash Flow Projections submitted to SBA as part of the application package. (EXHIBIT T) Solarado was caught in a regulatory impasse. In order to

obtain its first draw of $83,906 as per Business Plan Monthly Cash Flow Projection, Solarado was required to submit invoices or paid bills. (EXHIBIT S) The other difficulty was that the entire allotment for working capital purposes was 25% of the loan principal, or $40,000, which also had to be documented in advance for disbursement. By November 5, 1979 we were concerned whether Solarado could meet its critical marketing needs as presented in its Business Plan. The working capital restriction nullified Solarado's marketing plans. (EXHIBIT R)

The SBA imposed conditions which were inconsistent with the Regulations and the Authorization contrary to page 2, 2.(a) of the Authorization and Loan Agreement. For example, the requirement of guaranty and deed of trust (page 4 of the Authorization, (f) 6. is inconsistent with C.F.R. 130.7, as pleaded in this Memorandum. The imposed condition of guaranty and deed of trust is

contrary to Solarado's answer to #7 on the reverse side of the loan application (EXHIBIT V) that it did not have any guarantors or co-signers for the Solarado loan.

The request Solarado made in its Loan Application Business Plan Monthly Cash Flow Projection submittal (EXHIBIT V) and its acceptance by SBA authority per the Authorization, page 2, #2.(b) were breached. Most of the loan proceeds ($96,924) were disbursed later than six months. The last disbursement was on 8/11/81. The disbursement of the loan principal is discrepant with the terms of the Note, the request for disbursement submitted in the application/ business plan/Monthly Cash Flow Projections and the Authorization and Loan Agreement.

The Note I signed on behalf of Solarado, Inc. reads, "For value received..... One Hundred Sixty Thousand and no/100------- dollars....." Solarado, Inc. did not receive the total sum of $160,000 until Aug-

ust 11, 1981, two years after the note was signed. The business plan/application package stated a request for $83,906 the first draw, and was predicated on specified sums thereafter for six months as per Monthly Cash Flow Projections.

16. Solarado was incapable due to poor cash flow to meet any of its repayment obligations from business earnings. During the two years of business startup and disbursement and servicing of the loan, the SBA did not inform the guarantors that they had become or were going to become personally liable. (For reasons I do not understand, the wording of paragraph 11 of Solarado's et al Complaint does not reflect the true financial inability of Solarado to repay the loan.)

Solarado's primary difficulty stemmed from its inability to market its product due to the restriction of 25% in the use of energy loan proceeds. A direct re-

sult of the working capital restriction was Solarado, Inc.'s inability to employ a professional marketing person and to commit funds to a marketing program. Since my wife and I were forced to fall back on whatever marketing skills we could muster, we desperately needed the Government's non-financial assistance that would have been offered through "Training Grants for Seminars," if the SBA had implemented them. (EXHIBIT Q)

In spite of Solarado's financial difficulties, defendants believe Solarado fulfilled some of the intangible goals contemplated in the testimonies given in the pre-enactment hearings.

17. The inability of the solar industry to meet its optimistic growth projections increased Solarado's risk of failure. However, Solarado was not contractually bound with the solar energy industry. Solarado and SBA were contractually bound to

carry out the will of Congress and to safeguard Government and private funds from the vicissitudes of a startup small business entering a new industry. My wife and I worked diligently to serve the will and intent of Congress as we understood it in 1979; and to protect and develop our own $44,176 equity-investment in product development. (EXHIBIT O)

18. Solarado received nothing of value from the SBA. Solarado was burdened with adverse working capital restriction that defeated its most necessary function, marketing. A regulation such as the working capital restriction, that handicaps the efforts by constraining normal and necessary business functions is beyond any rational comprehension.

19. We first learned that we were being treated as if we had applied for or incurred a personal liability instead of a liability on behalf of the corporation when

we saw our names and the word, "Guarantors" on the Notice of Acceleration of Due Date of Note and Demand for Payment. (EXHIBIT N) The last disbrusement of the loan had been made on August 11, 1981, so it appeared that the $160,000 was due and payable immediately after "default" of Solarado, Inc. SBA did not forewarn us that it would rely on the personal security documents it had fraudulantly induced us to execute under circumstances that were foreign to SBA's later actions.

20. When we received the first Notice of Acceleration and Demand for Payment, we were so surprised that we called Tony Robinson at SBA headquarters, who told us not to worry; that it (the Acceleration/Demand) was only "a chance to sit around the bargaining table."

21. On Mr. Robinson's advice we attempted to engage in a settlement process. The process was a sham. First we searched

for private venture capital over a seven month time period, sending a revised business plan to 70 firms. When that proved futile, we tried to settle the debt on Solarado's behalf. Over a year's time, three written equitable settlements were made. The SBA rejected them on the basis that it could recover more by enforced collection in pursuit of the guarantors personally. On behalf of Solarado, we sold two large business assets and gave the proceeds of $7,500 toward the debt. At SBA's request, on behalf of Solarado, I executed peaceable possession form for the purpose of auctioning off the remaining business assets to satisfy the debt. (EXHIBIT M) The SBA refused to auction the remaining business assets.

22. For 4 years we have felt harassed and beseiged by SBA collection and litigation efforts with regard to a debt we did not knowingly incur; a debt that was disguised as a corporate debt; a debt that

was applied for and executed in the corporate name.

23. For four years we have felt SBA selected us for forced debt collection because of the large amount of equity in our house, although Solarado's default record was similar to most of the other 430 payment records. The four long years of SBA debt collection has caused irreparable psychological and financial injury to us and our children.

24. My wife, Shelley G. Reinisch, adopts the statements set forth in this Affidavit.

Dated: September 23rd, 1985

_____
Ronald F. Reinisch

Subscribed and sworn to before me this 23rd day of September, 1985, by Ronald F. Reinisch.

Witness my hand and official seal.

My commission expires: _____

_____
Notary Public

[S E A L]

Shelley G. Reinisch

Subscribed and sworn to before me this 23rd day of September, 1985, by Shelley G. Reinisch.

Witness my hand and official seal.

My commission expires:

Notary Public